88-1070

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether an occupational health standard designed by OSHA for one particular industrial sector (in this case, manufacturing) can properly be extended to cover other industrial sectors (here, including construction) in the absence of industry-specific showings that a significant risk of material harm exists and that the standard is feasible and reasonably necessary as to each industry to which it is made applicable.

(a) Did the Third Circuit err in holding, contrary to the District of Columbia, Fourth and Fifth Circuits, that proof of "significant risk" under section 6(b)(5) of the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, does not require industry-specific showings, but may be satisfied by "a general finding concerning all potentially affected industries"?

(b) Did the Third Circuit err in holding, contrary to the District of Columbia and Fourth Circuits and to OSHA's own interpretation of the Act, that section 6(b)(5) does not impose a burden on the Secretary to show the *feasibility* of a challenged standard, but rather may be satisfied by a mere absence of evidence that the standard would be *infeasible*?

(c) Did the Third Circuit err in refusing to consider whether the standard was reasonably necessary or appropriate as applied to construction, despite this Court's suggestion in *American Textile Manufacturers, Inc. v. Donovan*, 452 U.S. 490, 514 n.32 (1981) (*"ATMI"*), that the " 'reasonably necessary or appropriate' language" of section 3(8) of the Act "might . . . impose additional restraints on OSHA" beyond those contained in section 6(b)(5)?

2. Whether the Third Circuit improperly usurped OSHA's discretion to establish its own priorities and

procedures and implement its own permissible interpretation of its statutory mandate when the court ordered OSHA either to extend to all industries a standard OSHA had developed solely for the manufacturing sector, or to explain why it would be infeasible to do so, and further when the court compelled OSHA to make this determination without conducting additional evidentiary proceedings which OSHA had concluded were a necessary prerequisite to any extension of the standard.

3. Whether, any time an OSHA standard or other federal agency regulation is challenged in court as underinclusive because it excludes persons who might potentially have been regulated, all those persons who have been excluded from the regulation's coverage must then seek to intervene in the review proceedings, even though they are not presently aggrieved, lest they be "foreclosed" from obtaining full judicial review thereafter if the regulation is eventually extended to cover them.

LIST OF PARTIES

The parties to the consolidated proceedings below were Petitioners, The Associated General Contractors of America (AGC)* and The Associated General Contractors of Virginia, and Respondent Occupational Safety and Health Administration, U.S. Department of Labor. United Technologies Corporation and The National Grain and Feed Association, Inc. intervened in support of Petitioners. United Steelworkers of America, AFL-CIO, and the Building and Construction Trades Department, AFL-CIO intervened in support of Respondent.

In addition, Associated Builders and Contractors, Inc., The National Grain & Feed Association, Inc., and United Technologies Corporation were petitioners in the consolidated companion cases below. The "Construction Industry Trade Associations," ** and the National Paint and Coatings Association intervened in support of Petitioners. Public Citizen, Inc. and the Connecticut Council on Occupational Safety and Health intervened in support of Respondent.

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* The Associated General Contractors of America is an association of construction contractors, including general contractors. AGC has 32,000 members, including 8,400 general contractors, and includes within its membership the members of Petitioner The Associated General Contractors of Virginia.

** The "Construction Industry Trade Associations" is an organization consisting of the National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association.

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Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, The Associated General Contractors of America and The Associated General Contractors of Virginia (AGC), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on November 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet App. 1a) is not officially reported. The court's unofficially reported opinion is *Associated Builders and Contractors, Inc. v. OSHA*, 13 BNA OSHC 1945 (3d Cir. 1988). In order to ascertain the grounds of the judgment below, it is also necessary to refer to two prior decisions of the court of appeals which resulted in issu-

ance of the subject OSHA standard. *See* Sup. Ct. R. 21 (k) (ii).[1]

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 655(f), petitioners and others requested judicial review by the Third Circuit of an occupational safety and health standard promulgated by the Occupational Safety and Health Administration. The court below entered a judgment and an opinion denying the Petition for Review on November 25, 1988. No. petition for rehearing was filed.

The judgment of the court of appeals was entered on November 25, 1988.[2] On December 3, 1988, AGC and other parties below filed a timely motion to stay the issuance of the mandate. On December 15, 1988, having received no ruling from the Third Circuit with the mandate due to issue on December 16, AGC and other parties submitted an emergency application for stay of the mandate. As of this filing, that application was pending.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Statutes

Section 3(8) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(8) provides:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

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[1] *United Steelworkers of America, AFL-CIO v. Auchter*, 763 F.2d 728 (3d Cir. 1985) ("*USWA I*"), Pet. App. 22a; *United Steelworkers of America, AFL-CIO v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) ("*USWA II*"), Pet. App. 54a.

[2] Pet. App. 21a.

Section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5) provides:

> The Secretary, in promulgating standards dealing with toxic material or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

Section 6(f) of the Act, 29 U.S.C. § 655(f), provides:

> Judicial review
>
> Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

Section 6(g) of the Act, 29 U.S.C. 655(g), provides:

> Priority for establishment of standards
>
> In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

Regulations

Occupational Safety and Health Administration, Hazard Communication; Final Rule, 29 C.F.R. § 1926.59.[3]

Occupational Safety and Health Administration, Safety and Health Regulations for Construction, 29 C.F.R. § 1926.21(b)(1979), titled "Safety Training and Education, Employer Responsibility."[4]

STATEMENT OF THE CASE

A. The Development of a Hazard Communication Standard Applicable to the Manufacturing Sector

On January 16, 1981, OSHA's outgoing administration proposed a hazard communication standard. The preamble to the proposal stated that "[t]he proposed standard [was] designed primarily to provide hazards-related information to employees of employers engaged in manufacturing."[5]

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[3] A copy of the Final Rule has been lodged with the Clerk of this Court.

[4] Pet. App. 74a.

[5] 46 Fed. Reg. 4412, 4426 (January 16, 1981).

OSHA's new administration later withdrew the proposal.[6] In 1982, however, the new administration proposed a new hazard communication standard specifically for "all [manufacturing] employers in SIC Codes 20 through 39 (Division D, Standard Industrial Classification Manual)".[7]

When finally issued in 1983,[8] the standard required manufacturers, importers and distributors of hazardous chemicals to perform evaluations of those hazards;[9] to draft a detailed, technical document, called a material safety data sheet (MSDS), which summarizes the hazards and appropriate precautionary measures for each chemical; to place warning labels on all shipped containers; and to include an MSDS with the first shipment of a hazardous chemical to a customer.

The limited number of covered employers were also required to draft detailed hazard communication programs for their own employees; to train their employees on the hazards of the substances to which the employees were potentially exposed in their work; to make MSDSs available to their employees for all substances in the workplace defined as hazardous; and, to train their employees to understand MSDSs.

The preamble to the manufacturing standard proposal extended the following invitation for comments on its scope: "Comment is hereby invited on the appropriateness of the industry scope selected, and whether other industries should be included in the final standard if the record

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[6] 46 Fed. Reg. 12214 (February 13, 1981).

[7] 47 Fed. Reg. 12119 (March 19, 1982).

[8] 48 Fed. Reg. 53280 (November 25, 1983).

[9] As the court below noted, the range of substances defined as hazardous under the standard is extremely broad; it covers literally "thousands of chemical substances used in numerous industries." Pet. App. 13a.

warrants it." 47 Fed. Reg. 12102 (March 19, 1982). As to the construction industry, however, OSHA stated:

> OSHA did consider whether to expand the scope of [the proposal's] coverage to construction and other non-manufacturing industries. Application of a hazard communication standard to construction is still under review in view of the unique features of that industry. Other nonmanufacturing industries would appear to have fewer chemical hazards and would receive substantial downstream information benefits from the required labels on containers and MSDSs [material safety data sheets] on first shipments.

47 Fed. Reg. 12111.

The invitation for comments also stated:

> Although non-manufacturing employers are not covered by the proposal, * * * [o]nce finalized and implemented, its effectiveness in triggering downstream transmittal could be assessed, and determinations made as to the type of hazard communication standard that may be effective and beneficial for other industries, such as construction or agriculture. If necessary, the proposal could be extended or modified for these other industries at a later date.

47 Fed. Reg. 12101-02.

Consistent with the proposal, the final standard applied only to manufacturing employers in SIC Codes 20-39. The preamble to the final rule contained no analysis of how the standard would apply to construction or other non-manufacturing industries. 48 Fed. Reg. 53280 (November 25, 1983).[10]

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[10] Under OSHA regulations, 29 C.F.R. §§ 1910.10, 1911.11(b), pre-publication submission of a proposed standard to the OSHA Construction Advisory Committee is a condition precedent to lawful promulgation of an OSHA standard governing construction employers. *National Constructors Ass'n v. Marshal,* 581 F.2d 960, 970 (D.C. Cir. 1978). At the public hearing on the manufacturing

B. The Extension of the Manufacturing Standard to Construction

1. *The Third Circuit's Decision in* USWA I

The United Steelworkers of America, AFL-CIO (USWA) and others sought judicial review of OSHA's decision to regulate only manufacturing employers in SIC Codes 20-39 under the final rule. *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*"USWA I"*), Pet. App. 22a. Relying on section 6(g) of the Act, OSHA asserted that it had unreviewable discretion to set its rulemaking priorities; the agency also argued that it had articulated a cogent rationale for its choice. In short, OSHA said that it would study the experience with the hazard communication standard developed for the manufacturing industries which the agency had judged to have the greatest need for information disclosure, and then determine whether the same disclosure system would be necessary and effective in other industries such as construction. *USWA I*, Pet. App. 39a-41a. Significantly, the agency also argued that it had reviewed the Bureau of Labor Statistics (BLS) data on worker injuries in non-manufacturing, and had found that "record insufficient to establish the need to extend a standard designed for the manufacturing sector to additional industrial sectors, much less all employers," because the "data were not specific to chemical exposures." [11]

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proposal, the Director of OSHA health standards was asked if OSHA intended to submit the proposed standard to that committee. The OSHA official replied, "We don't have any present intentions of doing so. If we were to extend the scope of this to construction, as you know very well, we'd be required by law to do that." *Informal Public Hearing on Hazard Communication before the Occupational safety and Health Administration*, transcript p. 93 (June 15, 1982) (testimony of R. Leonard Vance).

[11] Brief for Secretary of Labor, *USWA I*, pp. 37-38. In this connection, it is important to note that construction workers were not unprotected; under an existing OSHA standard, 29 C.F.R. § 1926.21

The Third Circuit held that while Section 6(g) of the Act grants OSHA discretion "to set priorities for the use of the agency's resources, and to promulgate standards sequentially," once the agency promulgates a standard, it may exclude a particular industry from the standard only if it shows not only that the industries covered present greater hazards, but also "why it is not feasible for the same standard to be applied in other sectors, where workers are exposed to similar hazards." Pet. App. 40a. Since OSHA failed to show why non-manufacturing coverage would have "seriously impeded the rulemaking process," *id.*, the court allowed the standard to go into effect for manufacturing, but remanded the standard to OSHA, and ordered the agency to extend the standard to other sectors unless it could "state reasons why such application would not be feasible." *USWA I*, Pet. App. 42a.

2. *OSHA Conducts an Advance Notice of Proposed Rulemaking*

In response to the court's order, OSHA published an Advance Notice of Proposed Rulemaking (ANPR).[12] This was not a formal rulemaking;[13] rather, it was an informal notice which OSHA used to address several questions to the public on how the standard might work if applied to other industries. The agency conceded it lacked information on this issue. Referring to industries outside the manufacturing sector, OSHA specifically

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(b), Pet. App. 74a, construction employers were (and remain) required "to train the employees in hazard recognition related to their work." *Marshall v. M.W. Watson, Inc.*, 652 F.2d 977, 979 (10th Cir. 1981). The standard "requires more than a general safety program. . . It requires supervisory personnel to advise employees of the hazard associated with actual dangerous conduct in which they are presently engaging." *National Industrial Constructors, Inc. v. OSAHRC*, 583 F.2d 1048, 1055 (8th Cir. 1978).

[12] 50 Fed. Reg. 48794 (November 27, 1985).

[13] Section 6(b)(2) of the Act, 29 U.S.C. § 655(b)(2), requires publication of a proposed rule to commence rulemaking.

noted that "there is very little information concerning current practices of employers in those industries, or the applicability of the provisions as presently drawn when considering the diverse types of workplaces that may be encountered." [14]

3. *The Third Circuit's Decision in* USWA *II*

Dissatisfied with the pace of the the agency response to *USWA I*, the petitioners in that case moved to enforce its mandate. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*"USWA II"*), Pet. App. 54a. On review, defending its request for additional data, OSHA argued that "[t]he original rulemaking record did not provide a factual basis for a feasibility determination for sectors outside manufacturing." [15] The agency also contended that it was not permitted by the Act "to now 'skip' publication of a notice of proposed rulemaking and immediately promulgate a final rule." [16]

The Third Circuit granted the petitioners' motion. In so doing, the court held for the first time that the 1982 proposal had been adequate to notify all non-manufacturing interests that the final standard might apply to them. Nowhere did the court note that none of the non-manufacturing industries were then before the court. Pet. App. 60a. The court also explained that it intended OSHA to decide whether to extend the standard to non-manufacturing industries or to explain why that would be infeasible, based on the original rulemaking record which was before the court on review in *USWA I*.

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[14] 50 Fed. Reg. 48795.

[15] Secretary's Response to Petition's Motion For An Order Enforcing The Court's Judgment and Holding Respondent in Civil Contempt, *USWA II*, at 5. OSHA also noted that construction workers already received hazard information and training under its existing standard, 29 C.F.R. § 1926.21(b). *Id.* at 30 n.18. *See, supra*, n.11.

[16] *Id.* at 22.

The court's ultimate conclusion was that OSHA had unreasonably delayed rulemaking; therefore, under the Administrative Procedure Act, 5 U.S.C. § 706(1) (1982), the court ordered OSHA, within sixty days:

> to publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible. Such reasons will be supplied separately as to each category of excluded workers.

Pet. App. 68a.

4. *OSHA Unsuccessfully Seeks Rehearing*

OSHA sought rehearing and rehearing *en banc*, arguing that regardless of whether its 1982 rulemaking notice could be construed to have notified non-manufacturers of their potential coverage, the agency lacked the evidence that would justify its extension of the manufacturing standard to all other industries.[17] The agency stated that "the fact that employers outside manufacturing did not respond to the Secretary's invitation to comment during the original HCS rulemaking does not mean that the Secretary's finding regarding feasibility for those employers need not be based on substantial evidence." Pet. Rehearing at 12. In explaining again why it had elected after *USWA I* to collect information about the non-manufacturing sector, OSHA stated:

> In the instant case, the Secretary concluded that in order to fulfill his statutory mandate, he needed further evidence concerning, among other things, the economic impact of the HCS on non-manufacturing

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[17] The Secreary's Petition for Rehearing and Suggestion for Rehearing *En Banc* has been lodged with the Clerk of this Court. It is hereinafter cited as "Pet. Rehearing".

> industries. Courts reviewing OSHA standards establishing exposure limits for toxic substances have ruled that the Secretary should establish feasibility *on an industry basis* and that a determination of economic feasibility requires a finding as to the estimated cost of the standard to the industry and its effect on the industry's long-term profitability (Citations omitted). The existing record contained *no* evidence of that nature with respect to non-manufacturing industries.

Pet. Rehearing at 8 (Emphasis in original in part, added in part).

Given this lack of information in the 1982 record as to the impact of the standard on non-manufacturing industries, OSHA argued that following the court's order would make its final standard legally vulnerable:

> Since the burden is on the Secretary to establish, based on substantial evidence, the feasibility of its standards (citation omitted), expansion of the HCS without additional fact gathering leaves the standard legally vulnerable under existing case law. . . . The panel erred in a fundamental way by ordering promulgation of a standard whose limited evidentiary underpinnings create substantial risk of invalidation in the event of subsequent attack. * * * The panel, moreover, has apparently shifted the burden of proof onto the proponents of nonfeasibility or at least has improperly lowered the burden the Secretary bears to establish the feasibility of a standard.

Pet. Rehearing at 10-11. The petition for rehearing and suggestion for rehearing *en banc* was denied.

5. *OSHA Issues a Revised Hazard Communication Standard Applicable to Construction and Other Non-Manufacturing Industries*

In accord with the Third Circuit's order, on August 24, 1987, OSHA—without collecting further evidence—issued a revised standard that applies to all industries, includ-

ing construction.[18] The preamble to the standard contrasted significantly with the agency's prior representations to the Third Circuit as to the agency's assessment of the 1982 rulemaking record. Thus, in the preamble, OSHA stated, for example, "OSHA concludes that the original HCS rulemaking record * * * does not contain credible evidence indicating the standard would be infeasible in any industrial sector. In fact, OSHA believes that the *original* record on the whole supports a finding that the performance-oriented HCS is feasible for all industries." [19] OSHA conceded, however, "that information submitted during a normal rulemaking process might have resulted in further changes to the provisions [of the standard] to better address feasibility or practicality concerns." [20]

The extended standard contains several new, previously unseen provisions that are applicable to the construction industry. Key among these is a requirement that each employer on a multi-employer worksite, *e.g.*, a construction project, either exchange with each other employer MSDSs on every chemical and physical hazard which the employer's employees may encounter on site normally or in "foreseeable emergencies," or maintain such MSDSs in a central location on each site. 52 Fed. Reg. 31880 (1987). As applied to the construction industry, the revised standard thus requires that each contractor on a multi-employer construction site anticipate not only the substances it may need to bring on site, but also what other contractors may need to bring, and the possibility that its employees may be exposed to what others bring. It also requires that the contractor sort through and cate-

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[18] 52 Fed. Reg. 31852 (August 24, 1987). The revised standard together with the preamble thereto have been lodged with the Clerk of this Court.

[19] 52 Fed. Reg. 31855 (emphasis added).

[20] 52 Fed. Reg. 31854.

gorize the hundreds of MSDSs it regularly receives from its suppliers and have a full set on each site where it is working.

The standard also requires construction employers to train all new hires on the standard, and in how to read MSDSs. Contractors must also train all new hires on all potential exposures to chemical and physical hazards and must provide additional training if another contractor introduces a new hazard. This may mean stopping work until additional training is done.

The standard also requires contractors to treat each new hire, no matter how experienced, as untrained; indeed, a journeyman sent from a union hiring hall must be treated as if he knows nothing about the hazards of his trade. The standard takes no cognizance of the fact that, unlike in manufacturing, employee turnover in construction is substantial; employees frequently move from job to job; construction employs a high number of temporary employees; and exposure to toxic substances varies widely. Most exposures occur outdoors where ventilation is not a problem.[21]

C. The Decision Below

Petitioners and representatives of other construction and non-manufacturing employers sought review of the revised standard,[22] which the court below denied.

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[21] It was precisely for these and other reasons related to the unique workplace conditions in the construction industry that OSHA provided, and the D.C. Circuit approved, a construction exemption from the OSHA standard governing exposure to inorganic lead. *See United Steelworkers of America, AFL-CIO v. Marshall*, 647 F.2d 1189, 1309-10 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Association, Inc. v. Donovan*, 453 U.S. 913 (1981).

[22] Petitioners sought review in the Fourth Circuit. Associated Builders and Contractors, Inc. (ABC) and National Grain and Feed Association (NGFA) filed in the D.C. Circuit. United Technologies Corporation filed in the Second Circuit. The ABC petition was the

First, the court held that petitioners were "foreclosed by *USWA II*" from contending that non-manufacturers had not received adequate notice from the agency in 1982 that they might be regulated by the final hazard communication standard. Pet. App. 10a.[23] The court rejected the argument that it would be improper to estop petitioners from litigating this factual issue since they were not parties in *USWA II*. Citing its Internal Operating Procedures, the court held that in any event, "*USWA II* is a binding precedent of the court which this panel could not disregard even if it had a mind to do so." Pet. App. 11a.

The court also rejected petitioners' contention that there was insufficient record evidence of a significant risk of material health impairment from exposure to toxic substances in construction and other non-manufacturing industries to justify the rule. The court held that the record on this issue had been reviewed in *USWA I* and *II*, that the record on the significant risk issue was unchanged, and that the panel was not free to disregard the

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first filed; therefore, the petitions were first transferred to the D.C. Circuit, which then granted a USWA motion to transfer the petitions to the Third Circuit. Before transferring the case, the D.C. Circuit granted a temporary stay of the standard. Pet. App. 69a. Upon transfer, the petitions were assigned to a panel of the Third Circuit different than the one which decided *USWA I* and *II*. The new panel continued the stay, Pet. App. 71a, and eventually modified it to apply only to construction workers. Pet. App. 73a. In October 1987, the Office of Management and Budget disapproved portions of the revised standard, including the multi-employer worksite requirements, under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. In *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) ("*USWA III*"), the panel which decided *USWA I* and *II* found those disapprovals improper. In issuing its decision, however, the panel also purported to deny the motion for a stay, apparently unaware that another Third Circuit panel had earlier granted it.

[23] Compare, *supra*, p. 6.

holdings of those prior opinions of the court. Pet. App. 12a.

The court further rejected the contention that OSHA is required to determine whether the degree of risk in a particular industry makes the requirements of the standard applicable to that industry "reasonably necessary" under section 3(8) of the Act. The court stated:

> This rulemaking proceeding produced a performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries. For such a standard, the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries. A requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance.

Pet. App. 13a.[24]

As to feasibility, the court noted that following its remand in *USWA I*, OSHA had examined the record developed for the manufacturing sector and concluded that it "contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector." Pet. App. 14a. On this issue, the court purported to decline substituting its judgment for that of the agency. *Id.* The court also opined that if the record was weak on the feasibility of the standard in non-manufacturing, the fault "may not be laid at OSHA's door," for "affected employers received notice of the [1982] rulemaking proceeding." *Id.*

In so finding, the court ignored OSHA's admission in its Petition for Rehearing that it construed its statute

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[24] Petitioners had not contended that the reasonable necessity for the standard must be assessed on a substance-by-substance basis. Rather, they urged that it be assessed in terms of the overall risk which construction—as opposed to manufacturing workers—face from exposure to toxic substances.

to require a feasibiilty showing "on an industry basis", Pet. Rehearing at 8; that it was improper to shift the burden of proof onto the proponents of nonfeasibility, *id.* at 11; that OSHA had in fact "not passed upon" the issue of feasibility in non-manufacturing"; and that "[t]he existing [1982] record contained *no* evidence of that nature with respect to the non-manufacturing industries." *Id.* at 8. (emphasis in original).

REASONS FOR GRANTING THE WRIT

A. The Third Circuit's Ruling that the Act Requires OSHA to Make Only a General Finding of Significant Risk in All Potentially Covered Industries Conflicts with Decisions of the Fifth, District of Columbia and Fourth Circuits and Raises a Key Issue in the Administration of the Act.

As noted, the court below held that for the revised hazard communication standard, the significant risk requirement of Section 6(b)(5) of the Act "must of necessity be satisfied by a general finding concerning all potentially covered industries." Pet. App. 13a. This holding conflicts with the rulings of several circuits that have required OSHA standards to be supported by industry-specific findings as to the existence of a significant risk.

In *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980), for example, the Fifth Circuit struck down OSHA's cotton ginning standard because OSHA had improperly assumed that it could extrapolate studies of the acute health effects of cotton dust exposure in cotton manufacturing industries to cotton dust exposure in the ginning industry.[25] Utilizing an analysis particularly apt here, the Fifth Circuit emphasized that

[25] The Fifth Circuit decision was criticized by this Court in *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981) ("*ATMI*"), but on an entirely different point. 452 U.S. at 510 n.30.

OSHA could not use the risk data in one industry to regulate another industry, where the working conditions were different. The court observed that, unlike workers in cotton manufacturing, ginning workers are seasonal and transient, and perform most of their work outdoors. "These different conditions in the ginning industry yield significantly reduced exposure to cotton dust," the court said, with potentially different conclusions as to the risk of exposure in that industry. 630 F.2d at 409.

The Fifth Circuit's holding thus is clearly in conflict with the Third Circuit's decision in this case. The difference between the risk of material harm from exposure to toxic substances in manufacturing versus construction is at least as great as the inter-industry differences noted by the Fifth Circuit in the cotton dust case. Manufacturing is generally indoors, where limiting toxic substance exposure often depends heavily on ventilation, while construction is generally outdoors. The manufacturing sector employs a generally stable workforce with fixed workplaces, so that exposures are essentially constant and consistent. In contrast, construction is characterized by frequent employee turnover, short-duration jobs, and a working environment which changes constantly. These differences preclude any assumption that the risk of harm from worker to toxic substances in construction is likely to be the same as it is in manufacturing.[26]

Indeed, it was principally because of these differences that OSHA exempted construction from its lead standard. The D.C. Circuit approved the exemption on review, in part based on its finding that "the construction industry differs from other industries with lead exposures in sev-

[26] As noted, *supra*, when it decided not to apply the original standard to construction, OSHA recognized that the risks in construction were less likely than in manufacturing, and that training in hazard recognition and avoidance was already required in construction under 29 C.F.R. § 1926.21(b).

eral important ways." *United Steelworkers of America, AFL-CIO v. Marshall*, 647 F.2d at 1309-10. *See also, Building & Construction Trades Dep't v. Brock*, 838 F.2d 1258, 1279 (D.C. Cir. 1988) (medical program for construction workers not as extensive as for general industry workers because of high turnover and transient workforce).[27] Similarly, the Fourth Circuit approved exemption of the oil and gas drilling industry from OSHA's hearing conservation standard because the agency planned to address elsewhere the "unique hazards" in that industry. *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1455 (4th Cir. 1985) (en banc).

In sum, the decision below is in conflict with decisions of several other circuits which have recognized that OSHA cannot overgeneralize or assume that risks of harm in one industry are the same in all others, even if the hazards appear to be the same. As this Court stated in *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 662 (1980) ("*API*"), "assumptions are not a proper substitute for the findings of a significant risk of harm required by the Act."

Few issues are more fundamental to OSHA's ability to fulfill its mission of developing safety and health standards protecting American workers. This is particularly significant now, because OSHA is currently in the midst of a massive "generic"—rather than substance-by-substance—rulemaking to revise exposure limits for hundreds of toxic substances in most industrial sectors.[28] Because this rulemaking excludes construction, maritime and agriculture,[29] however, it is virtually certain that

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[27] As noted *supra*, p. 6, it was precisely because OSHA recognized these potential differences in the degree of toxic substance exposure as between manufacturing and construction that it initially declined to apply the hazard communication standard to construction.

[28] *See* 53 Fed. Reg. 20960 (June 7, 1988).

[29] 53 Fed. Reg. 20979.

the conflict presented here—whether findings of significant risk in one industry or industrial sector can be assumed to be applicable in others—will be a recurring problem in the administration of the OSH Act. This Court, therefore, should grant the writ to resolve this important conflict and provide guidance for rulemaking that presently is in progress.

B. In Ruling that it Was Sufficient for the Secretary to Find that the Record Contained No Evidence that the Standard Would Not Be *Infeasible* for Any Industrial Sector, the Decision Below Creates Conflicts with the District of Columbia and Fourth Circuits, Another Panel of the Third Circuit, and the Agency's Understanding of Its Own Statute.

The court below ruled that "as this court's remand [in *USWA I* and *II*) required, the Secretary examined the same [1982 manufacturing] rulemaking record, and concluded that it contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector." Pet. App. 14a. In ruling that an absence of proof of infeasibility is enough to support a determination of feasibility, the decision below conflicts with several circuits and with the agency's own understanding of section 6(b)(5) of the Act.

As OSHA itself stated in its petition for rehearing in *USWA II*:

> Courts reviewing OSHA standards establishing exposure limits for toxic substances have ruled that the Secretary should establish feasibility on an industry basis and that a determination of economic feasibility requires a finding as to the estimated cost of the standard to the industry and its effect on the industry's long-term profitability. See *ATMI, . . . United Steelworkers of America v. Marshall* (lead) 647 F.2d 1189, 1172 (D.C. Cir. 1981); *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1452-1453 (4th Cir. 1985) (en banc).

* * * *

> The panel, moreover, has apparently shifted the burden of proof onto the proponents of nonfeasibility or at least has improperly lowered the burden the Secretary bears to establish the feasibility of the standard. * * * Placing a burden on the Secretary to demonstrate infeasibility would be contrary to precedent . . . .

Pet. Rehearing at 8, 11-12.[30]

As the D.C. Circuit has stated, "[w]hen affected parties petition for pre-enforcement review of an OSHA standard, the standard must pass a preliminary test of general feasibility." *United Steelworkers of America v. Marshall, supra*, 647 F.2d at 1272. The statutorily mandated task is not to determine whether it has been proven that the standard will be infeasible; OSHA must affirmatively "prove feasibility." *Id.* at 1265. *Accord, Forging Industry Ass'n v. Secretary of Labor, supra*, 773 F.2d at 1452 ("the feasibility analysis involves an inquiry to determine whether a standard is both technologically and economically feasible").

As did the D.C. Circuit in the lead case, reviewing courts have both required and undertaken an industry-by-industry analysis of feasibility, even if that task is difficult. *See United Steelworkers of America, AFL-CIO v. Marshall, supra*, 647 F.2d at 1274, 1277-1310. *Accord AFL-CIO v. Marshall*, 617 F.2d 636, 669 (D.C. Cir. 1979), *aff'd in part, vacated in part and remanded*, 452 U.S. 490 (1981) (In D.C. Circuit cotton dust decision, court made industry-by-industry feasibility analyses and rejected OSHA's feasibility analysis for the cottonseed oil industry); *Forging Industry Ass'n v. Secretary of Labor, supra* (court recognized unique work-

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[30] In *ATMI, supra*, this Court quoted approvingly the Secretary's assertion that to satisfy the Act as to the showing required for the economic feasibility, "[a]t bottom, the Secretary must . . . determine that the industry will maintain long term profitability and competitiveness." 452 U.S. at 530 n.55.

place conditions of gas and oil drilling industry as basis for exempting industry from coverage of hearing conservation standard). Indeed, another Third Circuit panel remanded the coke ovens standard to OSHA for further consideration as to how it would apply to independent contractors who maintain and repair coke oven batteries, in part because the standard did "not address the particular problems faced by independent contractors . . ." *American Iron and Steel Institute v. OSHA*, 577 F.2d 825, 840 (3d Cir. 1978), *cert. dismissed*, 448 U.S. 917 (1980).

In sum, the decision below conflicts with several Circuits on another key issue in the promulgation of OSHA standards—*i.e.*, who bears the burden to prove feasibility and what is required to satisfy that burden. The significance of this conflict to the administration of the OSH Act is manifest and is another compelling reason for granting the writ.[31]

C. This Case Presents an Ideal Vehicle in Which to Clarify an Important Issue Which This Court Raised but Did Not Decide in *ATMI*, *i.e.*, Whether the "Reasonably Necessary" Language of Section 3(8) Imposes Restraints on OSHA Beyond Those of Showing Feasibility Under Section 6(b)(5).

In *ATMI*, this Court addressed the meaning of the term "feasible" in section 6(b)(5) of the Act, and rejected the contention that this section requires OSHA to perform a cost-benefit analysis of its standards. However, the Court expressly left open the question whether section 3(8) "might not impose additional restraints on OSHA." *ATMI*, 452 U.S. at 513 n.32. The Court declined there to rule on "all the applications that § 3(8) might have, either alone or together with § 6(b)(5)." *Id.*

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[31] The circuit conflict on the applicable law will remain significant regardless of whether OSHA now contends that the record proves the feasibility of the extended standard in non-manufacturing industries.

Here, although the issue was squarely raised to it, the court of appeals simply refused to consider whether the elaborate information dissemination scheme which OSHA developed for manufacturing is "reasonably necessary or appropriate" for construction within the meaning of Section 3(8), given the lesser or at least different degree of risk from exposure to toxic substances on construction worksites. Rather, the court simply proceeded as though the only requirement the standard had to meet was feasibility. This Court's comment in *ATMI*, however, suggests that the approach taken by the Third Circuit here may reflect an oversimplified view of the Act's requirements. *See also API, supra*, 448 U.S. at 662 (no finding that ban on dermal contact with benzene was " 'reasonably necessary or appropriate' to remove a significant risk of harm . . .").

In addressing the potential meaning of Section 3(8) in *ATMI*, this Court suggested, as an example, that

> if the use of one respirator would achieve the same reduction in health risk as the use of five, the use of five was ". . . feasible," and OSHA thus insisted on the use of five, then the "reasonably necessary and appropriate" limitation might come into play as an additional restriction on OSHA to choose the one-respirator standard.

452 U.S. at 513 n.32. The court below failed to appreciate that the same issue is raised here. Thus, it failed to consider, for example, whether it is "reasonably necessary or appropriate" to require construction employers to have the technical MSDSs physically present on every construction jobsite, or to require them to provide redundant hazard training to experienced construction tradesmen each time they move from job to job.

The contrast between the simplified approach taken by the court of appeals here and the more analytical one suggested by this Court in *ATMI* highlights a need for clarification of this important but as yet unanswered question under the Act. Indeed, the Fifth Circuit has

recently struggled with the meaning of the *ATMI* discussion of section 3(8), commenting *inter alia* that this "Court has sent somewhat confusing signals" as to aspects of its meaning. *National Grain and Feed Ass'n v. OSHA*, 858 F.2d 1019, 1034 (5th Cir. 1988). This case presents an ideal vehicle in which to provide this much-needed clarification.

D. Review Is Warranted to Clarify How This Court's *Chevron* and *Vermont Yankee* Tests Apply to Judicial Review of OSHA's Interpretations of Its Enabling Statute and to Resolve Conflicts in the Circuits as to the Circumstances in Which a Reviewing Court Should Compel Agency Rulemaking.

This Court has made clear that where "Congress has not directly addressed the precise question at issue," a reviewing court must refrain from any statutory interpretation of its own and must simply determine "whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *Accord INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987).

As this Court's decisions in *API* and *ATMI* make plain, the precise meaning of sections 6(b)(5) and 3(8) of the Act is far from clear.[32] It is plain from a comparison of the Secretary's Petition for Rehearing in *USWA II*, the decision below, and *USWA I* and *II*, however, that the Third Circuit substituted its judgment for that of OSHA as to the meaning of section 6(b)(5); this is especially so as to the burden of proof OSHA must satisfy to support its standards. If the agency's

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[32] Indeed, Chief Justice Rehnquist has maintained that given the ambiguity in the legislative history, section 6(b)(5) is an unconstitutional delegation of authority to the Executive Branch to make the " 'hard policy choices' which are properly the task of the legislature." *ATMI, supra*, 452 U.S. at 543 (Rehnquist, J., dissenting).

interpretation of its statute were permissible, the court below violated the rule of *Chevron* and its progeny.[33]

Furthermore, the usurpation of OSHA's responsibilities did not stop in this case with the interpretation of the OSH Act's *substantive* requirements. Rather, the court of appeals also dictated to OSHA the *procedures* to be followed in deciding whether or not to extend the coverage of the original hazard communication standard to other industries. Specifically, it ordered OSHA to decide that issue without giving further notice to affected interests or conducting further evidentiary proceedings, despite the agency's repeated protestations that it needed to give notice and take additional evidence before rendering its decision.

In this respect, the decision below also conflicts with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). There, a court of appeals, in rejecting a rule promulgated by the Atomic Energy Commission, had sought to dictate to the agency the procedures which the court felt should have been followed in the rulemaking proceedings. This Court held that the court of appeals had overstepped the bounds of judicial review. As this Court stated, "the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Id.* at 524. The Court went on to admonish the courts of appeals not to "stray beyond the judicial province to explore the procedural format or to impose upon the agency [their] own notion of which procedures are 'best' or most likely

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[33] One commentator has suggested that had this Court adopted the *Chevron* test before it decided *ATMI* and *API*, "the Court probably would have resolved each case with a single unanimous opinion." R. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vanderbilt L. Rev. 301, 311 (March 1988).

to further some vague, undefined public good." *Id.* at 550.

The court of appeals clearly failed to heed that admonition here; instead, it strayed beyond its province to forbid OSHA to take additional evidence and to compel it instead to render a decision based on a record the agency considered inadequate for that purpose. Accordingly, this Court should grant the writ to reinforce its views as to the proper role of a reviewing court as to issues of statutory interpretation and the selection of the procedures to be followed in carrying out an agency's statutory mandate.

A grant of review here would also enable this Court to resolve a conflict in the circuits over the circumstances in which a reviewing court should compel OSHA rulemaking. In *USWA I*, the court below held that OSHA's decision not to issue a standard for non-manufacturing was reviewable, notwithstanding the discretion afforded the agency in priority-setting under section 6(g) of the Act. The test for review under that section, the court said, is that:

> Once a standard has been promulgated, however, the Secretary may exclude a particular industry only if he informs the reviewing court, not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards.

Pet. App. 40a. Moreover, as noted, in *USWA II*, the court again substituted its judgment for OSHA's by holding that the agency was not permitted to collect additional evidence before deciding whether to extend the standard to other industries, but was compelled to base its decision solely on the original rulemaking record.

Plainly, the standard here in question would not have been issued absent the *USWA I* decision that "the Secre-

tary . . . failed to carry the burden of persuading . . . that section 6(g) justifies limitation of coverage to the manufacturing sector." Pet. App. 40a. Likewise, it is clear that the content of the administrative record in this case would have been very different but for the decision in *USWA II* barring the Secretary from considering any further evidence. Thus, these elements of the decision in *USWA I* and *USWA II* are properly now presented to this Court for review.

These same elements of those decisions also squarely conflict with several rulings of the D.C. Circuit, which has articulated a much more exacting standard for judicial intervention into OSHA's priority-setting. In *National Congress of Hispanic American Citizens v. Usery*, 554 F.2d 1196 (D.C. Cir. 1977), the court rejected the contention that once OSHA has commenced rulemaking addressing a particular hazard, its discretion to set priorities does not permit it to stop. The court replied that "this makes an absurdity of the Act and a fool out of Congress." *Id.* at 1199. Under section 6(g), the court held, OSHA may reorder its priorities "so long as [its] discretion is honestly and fairly exercised." *Id.* at 1200. *Accord, National Congress of Hispanic American Citizens (El Congresso) v. Marshall*, 626 F.2d 882, 888 (D.C. Cir. 1979) ("So long as [the] action is rational in the context of the statute, and is taken in good faith, [OSHA] has authority to delay development of a standard at any stage as priorities demand.").

As this case illustrates, those who disagree with OSHA's rulemaking priorities increasingly seek judicial review. It thus is important for this Court to resolve the circuit conflict as to the test which governs the circumstances under which a reviewing court should review the order in which OSHA chooses to develop standards.

E. By Holding that Petitioners are "Foreclosed" From Litigating Issues Which Affect Only Them and Which Were Decided in Their Absence in *USWA I* and *II*, the Decision Below Creates an Incentive for Protective Interventions in Future Agency Rulemaking Proceedings Which Will Substantially Burden the Federal Regulatory Agencies and the Courts.

Although they were not then parties, the court below held that petitioners were "foreclosed" by *USWA I* and *II* from litigating factual questions decided there which affected only them,[34] *i.e.*, that they had received adequate notice in 1982 that the standard might eventually regulate them,[35] and that OSHA properly found significant risk as to all industries based on the 1982 rulemaking record.[36] When the original standard was issued, however, petitioners were not then adversely affected within the meaning of section 6(f) of the Act; they would thus have lacked standing to seek judicial review of the standard. *See Fire Equipment Mfrs. Ass'n, Inc. v. Marshall*, 679 F.2d 679 (7th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). To preserve their right to challenge these findings, therefore, petitioners would have had to intervene in the proceedings brought to challenge OSHA's decision not to regulate outside the manufacturing sector.

The result below thereby turns the law of standing on its head. As this Court has stated:

> There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 80 (1978).

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[34] Pet. App. 10a.

[35] *Id.* at 11a.

[36] *Id.* at 12a.

If the decision below is not overturned, the federal courts and private litigants will be burdened with needless intervention litigation. For, as we have shown, OSHA frequently regulates some but not all industries under standards addressing particular hazards. In such instances, whenever a standard's underinclusiveness is challenged on review, all industries not covered will have to consider seeking to intervene; otherwise, they may be barred from full judicial review of the standard later. This Court should grant the writ to make clear that under traditional standing principles and section 6(f) of the Act, persons adversely affected by OSHA standards will enjoy a full right of judicial review once a standard purports to regulate them, and will not be barred by factual decisions affecting their rights made in their absence.

CONCLUSION

For these reasons, and upon the entire record herein, Petitioners respectfully submit that this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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December 28, 1988

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)
United Technologies Corporation, Associated General

Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF LABOR

Argued: September 16, 1988
Before: GIBBONS, *Chief Judge*, HUTCHINSON and SCIRICA, *Circuit Judges*

(Opinion Filed: November 25, 1988)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Before the court are four petitions for review of the revised hazard communication standard promulgated by the Secretary of Labor pursuant to Section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b) (OSH Act). The petitioners are the Associated Builders and Contractors, Inc. (ABC), the National Grain & Feed Association, Inc. (NGFA), the Associated General Contractors of Virginia, et al. (AGC), and United Technologies Corporation (UTC). These petitions were initially filed in the District of Columbia Circuit, the Second Circuit, and the Fourth Circuit. Since the filing in the District of Columbia Circuit was earliest, the other petitions were transferred and consolidated there. Thereafter, the Building and Construction Trades Department, AFL-CIO intervened, and on the motion of the intervenors the petitions were transferred to this court. The transfer order was made because the hazard review standard was before this court on three prior occasions. *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*USWA I*); *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*); *United Steelworkers of American v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) (*USWA III*). Because those prior decisions are controlling, we will deny the petition for review.

I.

In USWA I this court ordered the Occupational Safety and Health Administration (OSHA) to apply its recently promulgated hazard communication standard not only to the manufacturing sector, but to the non-manufacturing sector as well, unless the agency could "state reasons

why such application would not be feasible." 763 F.2d at 739. Except for a part of its treatment of trade secrets, the hazard communications standard was otherwise upheld. 763 F.2d at 743.

In *USWA II*, the petitioners in *USWA I* returned to the court seeking to enforce the judgment in that case. OSHA, following the *USWA I* judgment, had issued a notice of proposed rulemaking, claiming that the record was insufficient to determine the issue of feasibility of the standard outside the manufacturing sector. This court held that OSHA was not in compliance with the *USWA I* judgment, which did not contemplate notice and comment. It ordered OSHA to promulgate, within 60 days, a hazard communications standard applicable to all workers covered by the OSH Act, or state reasons separately, as to each category of excluded workers, why, on the basis of the present administrative record, a hazard communication standard is not feasible. 819 F.2d at 1270.

In *USWA III* the original petitioners moved for further relief in enforcement of the *USWA I* judgment. By then OSHA had on August 24, 1987, published an expanded hazard communication standard applicable to all industries. 52 Fed. Reg. 31852 et seq. (codified at 29 C.F.R. § 1910.1200). This revised standard was to go into effect on May 23, 1988. 29 C.F.R. § 1910.1200(j). On September 10, 1987, however, OSHA submitted it to the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). OMB, ostensibly in compliance with the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, 44 U.S.C. § 3506 et seq. (Supp. 1988), sought public notice and comment "on the recordkeeping, notifications, and other paperwork requirements of the revised standard." 52 Fed. Reg. 36652. Following a public hearing OMB purported to disapprove three provisions which the revised standard adopted. These three new provisions were: (1)

a requirement that at multi-employee worksites employers exchange Material Safety Data Sheets obtained from chemical manufacturers, 29 C.F.R. § 1910.1200(e)(2); (2) an exemption from the labeling requirements of the standard for consumer products used in the same manner and qualities as intended for consumer use, 29 C.F.R. § 1910.1200(b)(6)(vii); and (3) an exemption from labeling of drugs in tablet or pill form regulated by the Federal Drug Administration. 29 C.F.R. § 1910.1200 (b)(6)(viii). This court held that the regulations disapproved by OMB did not involve the collection of information within the meaning of the Paperwork Reduction Act. 855 F.2d at 113. Summarizing the prior history of the case, we noted:

> In USWA I we directed OSHA to reconsider the application of the hazard communication standard to employees in sectors of the economy other than manufacturing unless the Secretary could state reasons why such application would not be feasible. 763 F.2d at 739 (citing 29 U.S.C. § 655(b)(5)). In USWA II we made it clear that our first judgment required that feasibility be determined for each category of worker on the basis of the administrative record already compiled. 819 F.2d at 1270. Thus, our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside the manufacturing sector, by deciding whether or not they should be covered on the basis of the record. The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders. The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. *Cf. Action Alliance*, at 1455 (new round of rulemaking not required for a revision that is the "logical outgrowth" of the rulemaking record). Withdrawal of the provisions disapproved

> by OMB was accordingly inconsistent with those orders. Relief by motion is appropriate. 28 U.S.C. § 1651(a) (1982); 5 U.S.C. § 706(1) (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977); *USWA II*, 819 F.2d at 1270.

855 F.2d at 113-14.

II

The present petitioners, unlike those who were the moving parties in *USWA I*, *II*, and *III*, seek to prevent enforcement of the hazard communication standard. Their objections include both procedural and substantive challenges to the promulgated standard.

A.

Sufficiency of Notice of Rulemaking

The four petitioners contend that OSHA violated section 6(b) of the OSHA Act, 29 U.S.C. § 655(b), by failing to provide adequate notice of proposed rulemaking affecting their industries. That contention is foreclosed by *USWA II*, which exhaustively detailed the fact that the scope of industry coverage had been an important issue for public comment throughout the entire regulatory proceeding. The court wrote:

> On June 28, 1977 the Secretary published an advance notice of proposed rulemaking on hazardous materials labeling. *See* 42 Fed. Reg. 5,372 (1977). In that advance notice, the Secretary requested "public comment as to whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such standard to assure that employees are apprised of the hazards to which they are exposed." *Id.* All "interested persons" were "invited to submit written data, views, and arguments concerning a standard on hazardous material labeling." *Id.* at 5,373. Among the topics on which comments were requested was

> "[s]upported cost data of the estimated costs of coming into compliance with the recommendations of the advisory committee." *Id.* At this stage in 1977, the notice, like the Advisory Committee Report's recommendation, was addressed to all employers, not only to employers in the manufacturing sector.

819 F.2d at 1265. In the same opinion, this court recognized that the 1982 notice was at least as explicit. That notice invited comment on the appropriateness of the industry scope to be selected, and whether or not industries outside the manufacturing sector should be included. *Id.* at 1266. Thus this court's holding that the Secretary provided adequate notice to all employers was clearly stated.

The four petitioners urge that since they were not parties to the initial petition for review, they are not bound by the prior panel decision. OSHA, on the other hand, contends that the discussion of the notice of rulemaking in *USWA II* is law of the case. We need not resolve that difference, however, because in any event the facts with respect to the 1981 and 1982 notices have not changed, and a prior panel has applied the law to those facts. Thus *USWA II* is a binding precedent of the court which this panel could not disregard even if it had a mind to do so. Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, 8C. Nor are we of such a mind. The notice was sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry. Thus the petitioners' objections to the adequacy of notice of proposed rulemaking are rejected.

B.

The Significant Risk Finding

Several of the petitioners contend that the hazard communication standard is invalid because it was promulgated without a significant risk determination. Under

Sections 3(8) and 6(b)(5) of the OSH Act, 29 U.S.C. §§ 652(8), 655(b)(5), the Secretary must determine that there exists a significant risk of harm to employees and that a standard is reasonably necessary or appropriate to reduce that risk. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 614-15, 639 (1980) (plurality opinion).

The agency record on this issue was reviewed by this court in USWA I. The court upheld OSHA's finding that a section 6(b)(5) standard is required to address a significant risk to workers. 763 F.2d at 735. The significant risk finding applied to all workers who would be exposed to hazardous chemicals. *Id.* at 738. Indeed, the court noted the incongruity of protecting spray painters, for example, in the manufacturing sector, but not in construction. *Id.* at 737.

The agency record on this issue was reviewed once again in *USWA II*. In that case we ordered OSHA, on remand, to consider solely the feasibility of the standard outside the manufacturing sector, not to reestablish its need. 819 F.2d at 1270. As with the treatment of the notice issue in *USWA I* and *USWA II*, the record on the significant risk issue is unchanged, and this panel is not free to disregard the holdings in those prior opinions of the court.

Petitioners, ABC, AGC, and NGFA, contend that those opinions did not address their specific contention, that OSHA must make a significant risk determination separately for each industry: in this case, construction and grain processing or storage. We do not interpret the opinions so narrowly. The standard was approved for the manufacturing sector, which has twenty major Standard Industrial Classification (SIC) Code subdivisions. There is no more obvious need for industry specific significant risk determinations for the construction and grain industries than for subdivisions of the manufacturing sector. The holdings in USWA I and USWA

II sustained a general significant risk finding. Assuming, however, that those opinions were construed as leaving open the significant risk issue, as presently presented, the outcome would be no different. This rulemaking proceeding produced a performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries. For such a standard the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries. A requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible. We reject, as well, the contention by ABC and AGC that because the construction industry already provides training in hazardous materials handling, there is no significant risk in that industry. At best that argument establishes the existence of risks, and the requirement for maintenance on the jobsite of information on those risks can only make the existing training more effective. As to risks posed by grain dust, the propensity of grain elevators to blow up has been well documented.

C.

The Feasibility Determination

Several petitioners contend that the Secretary's feasibility determination, made after the remand in USWA II, is not supported by the rulemaking record. Unlike the notice of rulemaking and significant risk issues, the feasibility determination, outside the manufacturing sector, has not previously been addressed by this court. Our review of that determination asks whether "the Secretary carried out [her] essentially legislative task in a manner reasonable under the state of the record before [her]." *Synthetic Organic Chemical Mfrs. Ass'n v. Bren-*

nan, 503 F.2d 1155, 1158 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975) (quoting *Florida Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120, 129 (5th Cir. 1974)).

When OSHA adopts standards relating to activities on the frontiers of scientific knowledge, feasibility issues may be difficult. Here, however, the main components of the hazard communication standard, except for chemical manufacturers, are training of workers and the maintenance of labels and material safety data sheets furnished by chemical manufacturers. These obligations hardly approach the limits of feasibility. The Secretary had, prior to our remand in *USWA I*, already established that the employee training and the maintenance of labels and material safety data sheets is feasible in the manufacturing sector, encompassing a spectrum of SIC Code subdivisions with employers of all sizes. As this court's remand required, the Secretary examined the same rulemaking record, and concluded that it contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector. That conclusion is on the agency record completely supportable, and we are not permitted to substitute our legislative judgment for that of OSHA. If there are deficiencies in that record they may not be laid at OSHA's door, for as we hold in Part II A above, the affected employers received notice of the rulemaking proceeding.

D

The Unlawful Delegation Contention

One final substantive challenge to the hazard communication standard is advanced on behalf of NGFA, which contends that OSHA unlawfully delegated its rulemaking authority to the American Conference of Government Industrial Hygienists (ACGIH) when OSHA incorporated in the standard that organization's Threshold

Limit Values for Chemical Substances and Physical Agents in the Work Environment. ACGIH is an impartial scientific organization which identifies safe exposure levels for various substances.

This court in *USWA I* decided the delegation question when it held, over the objections of the petitioner Public Citizens, and the State of New Jersey as *amicus*, that OSHA need not itself evaluate specific chemical hazards, but could rely on information developed by chemical manufacturers. 763 F.2d at 739. The reliance on ACGIH is an *a fortiori* case, and *USWA I* controls. Even if it did not control, we would in any event reject the unlawful delegation contention. It was appropriate to adopt ACGIH's list as a floor, while imposing on chemical manufacturers the requirement that they research and assess hazards independently. 29 C.F.R. § 1910.1200 (d)(3). That action was fully consistent with section 6(b)(5) of the OSH Act, which directs OSHA to set toxic substance standards based on "the best available evidence" with due consideration to "the latest available scientific data."

III

None of the substantive or procedural challenges to the application of the hazard communication standard to the construction or grain processing and storage industries have merit. The petitions for review of ABC, AGC, and NGFA will therefore be denied. The stay of those standards granted by a panel of this court on June 24, 1988, shall be vacated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)

United Technologies Corporation, Associated General

Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ORDER AMENDING OPINION

The slip opinion in the above matter, filed November 25, 1988, is hereby amended as follows. The penultimate sentence of section III on page 16 should read: "The petitions for review of ABC, AGC, NFGA, and UTC will therefore be denied."

/s/ John J. Gibbons
Chief Judge

Dated: December 5, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)
United Technologies Corporation, Associated General

Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATURAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF THE REVISED HAZARD COMMUNICATION STANDARD PROMULGATED BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

Present: GIBBONS, *Chief Judge*, HUTCHINSON and SCIRICA, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the Occupational Safety and Health Administration, United States Department of Labor and were argued by counsel September 16, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review of the revised hazard communication standard promulgated by the said Administration and published at 52 Fed. Reg. 31852, et seq. (August 24, 1987), be, and the same are hereby denied. It is further ordered that the stay of the said standard granted by a panel of this Court on June 24, 1988 is vacated. Costs taxed against the petitioners. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

November 25, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-3554, 83-3561, 83-3565, 84-3066,
84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New York, the State of New Jersey, the State of Connecticut, and National Paint & Coatings Association,
Intervenors.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, American Petroleum Institute & Atlantic Richfield Company, and National Paint & Coatings Association,
Intervenors.

PUBLIC CITIZEN, INC., *et al.*,
Petitioners,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, National Paint & Coatings Association, American Petroleum Institute & Atlantic Richfield Company,
Intervenors.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Secretary of Labor, United States Department of Labor,
Respondent.

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR and John Donovan, Secretary of the United States Department of Labor,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent.

Argued March 18, 1985

Decided May 24, 1985

Before GIBBONS, Circuit Judge, and FISHER, Chief Judge* and KELLY, District Judge**

OPINION OF THE COURT

GIBBONS, Circuit Judge:

This case involves consolidated petitions for judicial mulgated by the Secretary of Labor on the authority of the Occupational Safety and Health Act of 1970 (OSH Act),[1] Pub.L. 91-596, 84 Stat. 1590, 92 U.S.C. § 651 *et*

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* Hon. Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] Petitions for judicial review of the standard were filed on November 22, 1983, in this Court by the United Steelworkers of America, AFL-CIO, and by Public Citizen, Inc., representing itself and a number of labor groups. Motions so intervene in these cases were received from the Chemical Manufacturers Association, the American Petroleum Institute, the National Paint and Coatings Association, and the States of New York, Connecticut, and New Jersey. In addition, petitions for review of the standard were filed by the State of Massachusetts in the First Circuit (No. 84-1063; Jan. 24, 1984);

seq. (1982). Certain intervenors challenge our jurisdiction to consider the petitions pursuant to 29 U.S.C. § 655(f) (1982), contending that the action under review is a regulation rather than a standard. Petitioners and the Secretary urge that we have jurisdiction. Petitioners and intervenors challenge the standard on several substantive grounds, while the Secretary defends it. We conclude that the petitions for review are properly here, and thus address the substantive challenges.

I.

Evolution of the Standard

Section 6 of the OSH Act directs the Secretary of Labor to promulgate occupational safety and health standards to further the purpose of the Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. §§ 651(b) and 655(b)(1) (1982). Any standard promulgated by the Secretary

> shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

29 U.S.C. § 655(b)(7) (1982).

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the State of New York in the Second Circuit (No. 83-4220; Dec. 20, 1983); the State of Illinois in the Seventh Circuit (No. 84-1111; Jan. 23, 1984); the Flavor and Extract Manufacturers' Association in the Fourth Circuit (No. 83-2151; Dec. 12, 1983); and the Fragrance Materials Association in the District of Columbia Circuit (No. 84-1021; Jan. 18, 1984). These cases were subsequently transferred to this Court and consolidated in this proceeding. The cases brought by the Flavor and Extract Manufacturers' Association and the Fragrance Materials Association have since been withdrawn.

In 1974, the National Institute for Occupational Safety and Health (NIOSH), an agency created by section 22 of the OSH Act, 29 U.S.C. § 671 (1982), recommended that the Secretary promulgate a standard requiring employers to inform employees of potentially hazardous materials in the workplace. 47 Fed.Reg. 12095 (1982). Later that year the Secretary appointed an advisory committee to develop standards for implementation of the statutory provision requiring labels or other appropriate forms of warning. That advisory committee issued its report on June 6, 1975, recommending a classification of hazards, the use of warning devices such as labels and placards, disclosure of chemical data, and employee training programs. *Id.* at 12096.

The 1975 Committee report did not result in prompt action by the Secretary. In 1976 a House of Representatives subcommittee held oversight hearings during which several committee members expressed concern over the Secretary's failure to promulgate a comprehensive Hazard Communication Standard. *Control of Toxic Substances in the Workplace: Hearings Before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations*, 94th Cong. 2d Sess. 87, 89-90 (1976). Seventeen months later, the full House Committee on Government Operations issued a Report which criticized the agency for "miserly use of its delegated powers to deal with disease and death-dealing toxic substances." House Comm. on Government Operations, *Failure to Meet Commitments Made in the Occupational Safety and Health Act*, H.R.Rep. No. 710, 95th Cong., 1st Sess. 13 (1977). The Committee concluded that:

> The Department of Labor should exercise its power under the Occupational Safety and Health Act to insure that employers and workers can and will know what kinds of toxic dangers are present in the Nation's workplaces. OSHA should require chemical

> formulators to identify any regulated substance in products they sell.

Id. at 15.

Eventually, on January 16, 1981, the agency published a notice of proposed rulemaking entitled "Hazards Identification." 46 Fed.Reg. 4412-53. The standard proposed would be applicable to employers in Division D, Standard Industrial Classification Codes 20-39, which include only employers in the manufacturing sector. *Id.* at 4426. This classification of employers is made by type of activity for the purpose of promoting uniformity and comparability in the presentation of statistical data. Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual 9* (1972). This initial proposal was withdrawn by the Secretary on February 12, 1981, for further consideration of regulatory alternatives. 46 Fed.Reg. 12214. The notice of proposed rulemaking which resulted in the rule challenged in the instant proceedings, entitled "Hazard Communication," was published on March 19, 1982. 47 Fed.Reg. 12091. Like the January 16, 1981 proposal, it was limited to employers in the manufacturing sector. The most significant difference from the rule proposed in 1981 was the inclusion in the March 19, 1982 proposal of a trade secret exception to the requirement that the chemical identities of all hazardous chemicals be disclosed. *Compare* 46 Fed.Reg. 4426 (1981) *with* 47 Fed.Reg. 12105 (1982).

The standard was published in its final form on November 25, 1983. 48 Fed.Reg. 53279. It requires that chemical manufacturers and importers "evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 C.F.R. § 1910.1200 (d)(1) (1984). It refers to several compilations of toxic materials. These lists establish a floor of toxic substances which chemical manufacturers or importers must treat as

hazardous. 29 C.F.R. § 1910.1200(d)(3) (1984). Chemicals not included in the designated compilations must be evaluated for hazardousness by reference to "available scientific evidence." 29 C.F.R. § 1910.1200(d)(2) (1984). A manufacturer or importer of chemicals found to be hazardous must "ensure that each container . . . leaving the workplace is labeled" with the chemical identity, with appropriate hazard warnings, and with the name and address of the source. 29 C.F.R. § 1910.1200 (f)(1) (1984). Manufacturers or importers must also prepare a "material safety data sheet" (MSDS) containing the chemical common names of each hazardous ingredient, and information necessary for safe use of the product. 29 C.F.R. § 1910.1200(g) (1984). The MSDS must be provided to each employer in the manufacturing sector (Standard Industrial Classification Codes 20-39) purchasing a hazardous chemical. That employer must in turn make the MSDS available for employee inspection, 29 C.F.R. § 1910.1200(g)(8) (1984), and "shall provide employees with information and training on hazardous chemicals in their work area. . . ." 29 C.F.R. § 1910. 1200(h) (1984).

The rule allows an exception from the labeling and MSDS ingredient disclosure requirements when a chemical manufacturer or importer claims that the chemical identity is a trade secret. 29 C.F.R. § 1910.1200(i) (1984). In such a case, the manufacturer or importer must provide a MSDS disclosing the hazardous properties of the chemical and suggesting appropriate precautions. in the case of a medical emergency, the manufacturer or importer must disclose the chemical identity to a treating physician or nurse, and may later require such a health professional to sign a confidentiality agreement. 29 C.F.R. § 1910.1200(i)(2) (1984). Absent a medical emergency, the manufacturer or importer may be required to disclose the chemical identity to a health professional who makes a written request detailing the

occupational need for the information, and who is willing to sign a confidentiality agreement containing a liquidated damages clause. 29 C.F.R. § 1910.1200(i)(3) & (4) (1984). In no case is the manufacturer required to disclose the precise formula, as opposed to the identity of chemicals in the compound.

The rule provides expressly that:

> [t]his occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject.

29 C.F.R. § 1910.1200(a)(2) (1984). Thus, at least insofar as they might require hazard communication to employees in the manufacturing sector, state hazard disclosure laws are claimed to be preempted by the rule.

II.

Jurisdiction Under Section 6(f) of the OSH Act

Congress has in section 6 of the OSH Act authorized the Secretary to issue health and safety standards. 29 U.S.C. § 655 (1982). In section 8(c)(3) of the Act, Congress also authorized the Secretary to issue regulations requiring employers to keep records and inform employees of worker exposure to potentially toxic materials or harmful physical agents. 29 U.S.C. § 657(a)(3) (1982). Classification of the Hazard Communication Standard as a section 6 standard or a section 8 regulation will have two interrelated consequences.

First, Congress has vested in the courts of appeals jurisdiction over challenges to the validity of section 6 standards. 29 U.S.C. § 655(f) (1982). Congress has made no such decision with respect to judicial review of section 8 regulations. These are reviewable in the district courts pursuant to the Administrative Procedure Act.

5 U.S.C. § 703 (1982). Thus if the Hazard Communication Standard is a section 8 regulation the only course open to us would be to transfer the petitions for review to an appropriate district court. 28 U.S.C. § 1631 (1982). A court of appeals would reach the merits of a dispute over a regulation, therefore, only on an appeal from a judgment of the district court.

Second, by whatever route the case arrived in a court of appeals, whether the challenged rule is a section 6 standard or a section 8 regulation affects its preemptive effect on state law. Section 18(a) of the OSH Act provides explicitly:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

29 U.S.C. § 667(a) (1982). If, however, a section 6 standard has been adopted, the role of the states is circumscribed by section 18(b) which provides:

> Any State which, at any time, desires to assume responsibility for development and enforcement of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (1982). The Secretary must accept such a state plan if it "will be at least as effective in providing safe and healthful employment" as the OSHA standards. 29 U.S.C. § 667(c)(2) (1982).

The intervenor states all have hazard disclosure laws which, if not preempted, would be operative in the manufacturing sector. None contend, however, that they have

submitted and have obtained approval of their plans pursuant to section 18. Given the explicit language of sections 18(b) and (c), the conclusion is inescaable that if the rule in issue is a section 6 standard it preempts state law until a state obtains section 18 approval of a state plan. It is not likely that the states challenging the rule will seek such approval, for section 18 contemplates that if they do so, they take on the fiscal burdens of enforcement now borne by the United States. 29 U.S.C. § 667(c)(5) (1982).

Since the disclosure requirements of laws adopted by the intervening states are in several respects stricter than those adopted by the Secretary, it is not surprising that those states would have us classify the challenged rule as a section 8 regulation rather than a section 6 standard. The preemptive effect of a section 8 regulation is not dealt with explicitly in the OSH Act, and any implied preemption would require a finding that is impossible to comply with both federal and state law, or that "the state law stands as an obstacle to the accomplishment and the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). It is not likely that we could make either such finding.

The agency decision to include in its rule an express provision preempting state law would, if the rule is a section 8 regulation rather than a standard, be reviewable pursuant to the Administrative Procedure Act. *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). The Secretary's inclusion of an express reference to preemption in the manufacturing sector appears to have been motivated at least in part by the desire to reduce the regulatory burden posed by multiple state laws. 48 Fed. Reg. 53284 (1983). That purpose is arguably at odds with congressional intention that the OSH Act provide

a federal floor for safety in the workplace. Reduction of burdens posed by multiple state laws does not appear to have been a significant congressional concern; rather, Congress favored a uniform federal law so that those states providing vigorous protection would not be disadvantaged by those that did not. Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, Pub.L. No. 91-596, at 144, 413, 444 (1971). We need not, however, decide whether preemption would be implied, or whether the preemption provision of the rule itself is valid as section 8 regulation, if we conclude that the rule is a section 6 standard, for, as noted above, such standards are explicitly preemptive under the statute.

The Act provides no definition of the term "regulation." The term "occupational safety and health standard" is defined as

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

29 U.S.C. § 652(8) (1982). This definition is not helpful in the task of differentiating between standards and regulations, for it can hardly be said to exclude the dictionary definition of the term regulation.

The states urge that the difference between section 6 standards and section 8 regulations must be determined by looking at the separate purposes behind the two provisions. Section 6 standards, they urge, serve two purposes: (1) to improve safety in the workplace by removing specific and already-identified hazards; and (2) to provide objective criteria capable of immediate application. Section 8 regulations, they urge, are designed, not for the elimination of specific and already-identified haz-

ards, but for such purposes as the facilitation of investigation and enforcement. The states place principal reliance, in this regard, upon *Louisiana Chemical Association v. Bingham*, 657 F.2d 777, 782-83 (5th Cir.1981), in which the court classified the agency's Records Access rule as a section 8 regulation. The court in *Louisiana Chemical Association* held that before proceeding to the merits of a section 6(f) petition for review it must determine "whether the challenged rule reasonably purports to correct a particular 'significant risk' or instead is merely an enforcement or detection procedure designed to further the goals of the Act generally." *Id.* at 782. It concluded that the Records Access rule was a section 8 regulation.

The quoted distinction provides a convenient test for identifying standards, which this rule satisfies. While both the Records Access rule and the Hazards Communication rule have in common the object of communicating hazard information to employees, the former only provides for access to records maintained by an employer for other purposes, while the latter is aimed at eliminating the specific hazard that employees handling hazardous substances will be more likely to suffer impairment to their health if they are ignorant of the contents of those substances. The Secretary found that inadequate communication is itself a hazard, which the standard can eliminate or mitigate. 48 Fed.Reg. 53321 (1983). *See also* 48 Fed.Reg. 53282-83, 53323-24, 53327-29 (1983).

The State of New York urges that a communication rule can never be a standard, because it does not provide for dimunition of risk through improved protection or reduced exposure. The Secretary found, however, that risk of harm can be greatly reduced by direct warning to employees, who are in the best position to assure that dangerous substances are handled in the safest possible manner. 47 Fed.Reg. 12112. Moreover New York's in-

terpretation of section 6 is inconsistent with the inclusion therein of the direction to the Secretary to promulgate standards which "prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed. . . ." 29 U.S.C. § 655(b)(1) (1982). Finally, while we exercise independent judgment as to the distinction between a section 6 standard and a section 8 regulation, the interpretation of those provisions of the OSH Act by the agency charged with its implementation should be afforded some degree of deference. The Secretary has classified the rule as a standard, and urges that the petition for review is properly here.

We conclude, therefore, that the Hazard Communication Standard is a section 6 standard reviewable in this court pursuant to section 6(f).

III.

Premption of State Hazard Communication Rules in the Manufacturing Sector

Our analysis of the jurisdictional issue disposes of the states' objection to preemption of their hazard disclosure laws with respect to employees in the manufacturing sector. The Hazard Communication Standard, to the extent it is valid, as a section 6 standard, applies to the exclusion of state disclosure laws which have not been approved in accordance with section 18.

Massachusetts, Illinois, New Mexico, and West Virginia raise the question whether the federal Hazard Communication Standard operates to preclude state laws outside the manufacturing sector. The Secretary does not contend that the Standard has such an effect. 48 Fed.Reg. 53284; Respondent's Brief at 84-89. He urges, as well, that the issue of the standard's operation outside that sector is not ripe for review. To the extent

that the states seek a declaration that their hazard disclosure laws may operate outside the manufacturing sector, we agree that it would be premature to make such a declaration in this case. The Secretary does not urge that they may not so operate, but other parties not before us might present reasons, such as unseverability as a matter of state law, which have not been litigated before this court. We hold only that, to the extent it is valid, the federal Hazard Communication Standard preempts state hazard disclosure laws with respect to disclosure to employees in the manufacturing sector.

IV.

Challenges to Validity of the Standard

A. Scope of Review

Petitioners' challenges to the validity of the standard present three issues: (1) its limited application to the manufacturing sector; (2) the failure to adopt as a list of hazardous substances the Registry of Toxic Effects of Chemical Substances (RTECS) compiled by NIOSH; and (3) the inclusion of the trade secret exemption. We consider the validity of those aspects of the rule under the hybrid review scheme of section 6(f), which refers us to substantial evidence in the rulemaking proceeding. We first interpreted section 6(f) in *Synthetic Organic Chemical Manufacturers Association v. Brennan*, 503 F.2d 1155 (3d Cir. 1974), *cert. denied*, 420 U.S. 973, 95 S.Ct. 1396, 43 L.Ed.2d 653 (1975). We noted that section 6(e) of the OSH Act requires that whenever the Secretary promulgates a standard he must publish a statement of the reasons for that action in the Federal Register. *Id.* at 1159-60. We held that these published reasons are subject to judicial review, and that they must be consistent with the language and purpose of the OSH Act. We held, further, that judicial review of a standard involves at least five steps:

(1) determining whether the Secretary's notice of proposed rule making adequately informed interested persons of the action taken;

(2) determining whether the Secretary's promulgation adequately sets forth reasons for his action;

(3) determining whether the statement of reasons reflects consideration of factors relevant under the statute;

(4) determining whether presently available alternatives were at least considered; and

(5) if the Secretary's determination is based in whole or in part on factual matters subject to evidentiary development, whether substantial evidence in the record as a whole supports the determination.

Id. at 1160. This approach to judicial review under section 6(f) has since been consistently followed. *See, e.g., American Iron and Steel Institute v. Occupational Safety and Health Administration*, 577 F.2d 825, 830-31 (3d Cir.1978), *cert. granted*, 448 U.S. 909, 100 S.Ct. 3054, 65 L.E.2d 1139 (1980); *cert. dismissed*, 448 U.S. 917, 101 S.Ct. 38, 65 L.Ed.2d 1180 (1980); *Atlantic & Gulf Stevedores, Inc. v. Occupational Safety and Health Review Commission*, 534 F.2d 541, 551 (3d Cir.1976); *AFL-CIO v. Brennan*, 530 F.2d 109, 114 (3d Cir.1975). Moreover we have held that "in a § 6(f) proceeding the Secretary has an affirmative burden to demostrate the reasonableness of an adopted standard." *Atlantic & Gulf Stevedores*, 534 F.2d at 551.

In this case no petitioner or intervenor questions the adequacy of the Secretary's notice of proposed rulemaking. Our review, therefore, involves the other four *Synthetic Organic* factors.

B. Limitation of Coverage to the Manufacturing Sector

None of the petitioners still before us contend that the manufacturing sector should not be covered by a hazard communication standard. The Secretary's decision to provide coverage only for employees in the manufacturing sector is based on a finding that this sector, which includes 32% of total employment, accounts for more than 50% of the reported cases of illness due to chemical exposure. 48 Fed. Reg. 53285 (1983). From this datum the Secretary determined that employees in the manufacturing sector have the greatest risk of experiencing health effects due to chemical exposure. *Id.* Agricultural employees have a higher chemical source incidence rate than manufacturing employees. The Secretary discounted this datum, however, because 80% of the reported chemical source cases among agricultural workers involved skin illnesses from handling plants, which would not be regulated by the proposed Hazard Communication Standard. *Id.* Moreover the Secretary concluded that the Environmental Protection Administration has, under the Federal Insecticide, Fungicide and Rodenticide Act, exercised jurisdiction over regulation of field use of pesticides. Excluding agricultural employees, there is substantial evidence in the record that the manufacturing sector has the highest incidence rate of chemical exposures which the Agency has authority to regulate.

Several petitioners, while conceding that the finding about incidence rate of illnesses in the manufacturing sector is supported by substantial evidence, contend that the Secretary's exclusion of other sectors, such as service, construction, and agriculture, is unsupported by reasons that are consistent with the purposes of the statute. They urge that while the incidence rate for employees in the manufacturing sector is high overall, some employees in specific non-manufacturing categories, such as hospital workers, are exposed to a greater number of toxic sub-

stances than are typical workers in the manufacturing sector. Moreover some workers in specific non-covered industries have higher reported rates of chemical source illness and injury than do workers in many covered industries. The Standard Industrial Classification breakdown, they contend, is not relevant to the statute, since that classification is made for a myriad of statistical purposes, mainly economic, having little to do with exposure to hazards. The result of the standard is that spray painters in the manufacturing sector, for example, must be provided with MSDS's and with information and training on hazardous chemicals in the products they use, while spray painters in the construction industry using the same products are not so protected.

In explaining the limited coverage, the Secretary reasoned:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need.

45 Fed.Reg. 53286. Rejecting arguments of participants in the rulemaking proceeding that other workers, such as painters in the construction industry, are exposed to the same hazards as are workers in the manufacturing sector, the Secretary reasoned:

> As stated previously, OSHA acknowledges that exposures to hazardous chemicals are occurring in other industries as well. A limited coverage of them is included in the final standard since all containers leaving the workplace of chemical manufacturers, importers, or distributors will be labeled, regardless of their intended destination. This will alert downstream users to the presence of hazardous chem-

> icals, and the availability of material safety data sheets. The Agency contends that the focus of this standard should remain on the manufacturing sector since that is where the greatest number of chemical source injuries and illnesses are occurring. This focus will also serve to ensure that hazard information is being generated for chemicals produced or imported into this country, and this increased availability will benefit all industry sectors.

Id. The Secretary's reasoning does not address the petitioners' contention that reliance on the Standard Industrial Classification is inappropriate because it ignores the high level of exposure in specific job settings outside the manufacturing sector.

The Secretary maintains that section 6(g) of the Act affords him unreviewable discretion to determine what industries shall be covered by a standard. That section provides in relevant part:

> In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments.

29 U.S.C. § 655(g) (1982). We reject the Secretary's contention that his priority-setting authority under section 6(g) vitiates judicial review of his determination that only the manufacturing industry need be covered by the Hazard Communication Standard. Section 6(g) must be read in conjunction with section 6(f), which provides for judicial review of standards. Indeed the language "due regard to the urgency of the need for mandatory safety standards for particular industries" suggests to us a statutory standard by which to measure

the exercise of the Secretary's priority-setting discretion.[2] In *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1309-10 (D.C.Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981), the court reviewed under section 6(f) the Secretary's decision to exempt the construction industry from a standard limiting exposure to lead. Although the court did not explicitly address section 6(g), it implicitly rejected the contention that the Secretary's priority-setting authority is unreviewable. We do so explicitly.

Our difficulty with the Secretary's reliance on section 6(g) arises from the Secretary's failure to explain why coverage of workers outside the manufacturing sector would have seriously impeded the rule-making process. Section 6(g) clearly permits the Secretary to set priorities for the use of the agency's resources, and to promulgate standards sequentially. Once a standard has been promulgated, however, the Secretary may exclude a particular industry only if he informs the reviewing court, not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards. *See United Steelworkers*, 647 F.2d at 1309-10. The explanation for the Secretary's action quoted above is deficient in the latter respect. Thus the Secretary has failed to carry the burden of persuading us that section 6(g) justifies limitation of coverage to the manufacturing sector.

We are also unpersuaded by the Secretary's contention that the communication rule will "trickle down" to uncovered workers because containers will be labeled. Section 6(b)(5) requires that:

> The Secretary, in promulgating standards dealing with toxic materials or other harmful physical agents

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[2] The Secretary urges that *Public Citizen Health Research Group v. Marshall*, 485 F. Supp. 845 (D.D.C. 1980) supports his interpretation of section 6(g). If it does, we decline to follow it.

> . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

29 U.S.C. § 655(b)(5) (1982). There is record evidence that workers in sectors other than manufacturing are exposed to the hazards associated with use of toxic materials or other harmful physical agents. The Secretary has given no statement of reasons why it would be given the same MSDS's and training as must be given to workers in the manufacturing sector. Section 6(c)(7) provides that:

> Any standard . . . shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

29 U.S.C. § 655(c)(7) (1981): The Secretary has given reasons why the labeling, MSDS, and instructions requirements comply with section 6(c)(7) for employees in the manufacturing sector, but no explanation why the same information is not needed for workers in other sectors exposed to industrial hazards. Such a statement of reasons is required by section 6(f). *Synthetic Organic*, 503 F.2d at 1160.

We hold, therefore, that the petitions for review of those petitioners who object to the limitation of the Hazard Communication Standard must be granted. That standard may continue to operate in the manufacturing sector, but the Secretary's explanation for excluding other sectors does not withstand the scrutiny mandated by

section 6(f). Thus the Secretary will be directed to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible. 29 U.S.C. § 655(b)(5).

C. Failure to Incorporate the RTECS Hazard List

While the Hazard Communication Standard includes several lists of substances which chemical manufacturers and importers must treat as hazardous, the Standard places primary responsibility for determining which products are hazardous on the chemical manufacturer or importer. 29 C.F.R. § 1910.1200(d)(1) (1984). Petitioner Public Citizen urges that the Secretary should have adopted the RTECS list compiled by NIOSH. The agency found that the hazard determination procedure provided the most protective coverage possible by establishing standards to guide manufacturers in determining whether a substance is hazardous. 48 Fed.Reg. 53299. It rejected use of the RTECS list, finding that it was overinclusive because it encompasses "potential" as well as "indentifiable" hazards, *id.* at 53298, and that it was underinclusive because no one list can remain suitably up-to-date, *id.* at 53296. These findings are supported by the Introduction to the RTECS list in which the editor explains that "[t]he absence of a substance from the Registry does not imply that the substance is non-toxic, and thus non-hazardous, any more than the presence of a substance in the Registry indicates that the substance is hazardous in common use." NIOSH, Registry of Toxic Effects of Chemical Substances (RTECS) Introduction xi (July 1984). Indeed the editor notes that the RTECS list includes substances that are common in everyday life and in nearly every household. *Id.* at x.

The Public Citizen contends that OSHA's determination that the RTECS list is inappropriate is belied by the Agency's use of that list in its Records Access rule, *see*

Louisiana Chemical Association v. Bingham, 657 F.2d 777, 783 & n. 10 (5th Cir. 1981). The Records Access rule, which merely requires that employers make available those records which are kept anyway, imposes a much lighter burden on employers than the Hazard Communication Standard. Because the purposes and requirements of the two rules are not identical, it was reasonable for the Secretary to conclude that the hazard determination procedure for each rule need not be identical. We conclude that the Secretary's rejection of the RTECS list as overinclusive is supoprted by substantial evidence and is consistent with the OSH Act's statutory purposes.

D. The Trade Secret Exemption

Several petitioners challenge the inclusion in the Hazard Communication Standard of a "trade secret" exception. 29 C.F.R. § 1910.1200(i) (1984). They contend that the agency has defined "trade secret" too broadly, and that the conditions under which workers may obtain information claimed to be a trade secret are unduly burdensome.

1. The Defintion of Trade Secret

Trade secret protection may arise from two sources: state law or a federal statute. *Ruckelshaus v. Monsanto Co.*, —— U.S. ——, ——, 104 S.Ct. 2862, 2872, 81 L.Ed.2d 815 (1984); *Chevron Chemical Co. v. Costle*, 641 F.2d 104, 115 (3d Cir.), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1981). The CSH Act does not create substantive trade secret protection. It deals with that subject in section 15, which provides:

> All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceding under this chapter which contains or which might reveal a trade secret referred to in section 1905 of Title 18 shall be considered confidential for the purpose of that section,

> except that such information may be disclosed to other officers or employees concerned with carrying out this chapter or when relevant in any proceding under this chapter. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

29 U.S.C. § 664 (1982). The cross-reference to the Trade Secrets Act, 18 U.S.C. § 1905 (1982) confirms that Congress intended section 15 to protect against agency disclosure or misuse of data submitted to it under an expectation that the agency would treat that data at a trade secret to the extent that applicable state law did so. *See Ruckelshaus v. Monsanto, supra,* —— U.S. at ——, 104 S.Ct. at 2876. Section 15 cannot be read as authorizing the creation of trade secret protection going beyond that afforded under state law. Moreover that section deals only with what the agency and its employees may disclose, not with what disclosures the agency may compel in the interest of safety in the workplace.

The Secretary contends that while section 15 deals with disclosures by the agency and its employees, it embodies a recognition by Congress of the significance in the economy of state law trade secret protection, and that it was quite appropriate, in drafting the Hazard Communication Standard, to balance that recognition against the competing congressional concern over safety in the workplace. *See* 48 Fed.Reg. 53312 (1983). Aside from section 15, however, the Secretary points to no provision in the OSH Act authorizing such balancing. Indeed trade secret protection is not even mentioned in section 6, which directs that "[t]he Secretary . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health. . . ." 29 U.S.C. § 655(b)(5). The quoted provision indicates that Congress struck a balance in favor of safety

in the workplace at the expense of competing interests. In a slightly different context, the Supreme Court held that in section 6(b)(5), "Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 509, 101 S.Ct. 2478, 2490, 69 L.Ed.2d 185 (1981).

The Secretary originally proposed that while traditional trade secrets such as chemical formula and process information could be withheld, chemical identity information must be disclosed. 46 Fed.Reg. at 4426 (1981). When representatives of the chemical industry commented on the importance of trade secrets to the economic health of that industry, *see* 48 Fed.Reg. 53312-14 (1983), the Secretary adopted an entirely new approach. First, it defined a trade secret as:

> [A]ny confidential formula, pattern, process, devise, information or compilation of information (including chemical name or other unique chemical identifier) that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it.

29 C.F.R. § 1910.1200(c) (1984). The Secretary contends that this definition was adopted from section 757 of the Restatement of Torts, 48 Fed.Reg. 53314. In fact, however, inclusion of the parenthetical "(including chemical name or other unique chemical identifier)" not found in section 757, enlarges considerably the Restatement definition. The Secretary's comments indicate that the definition provides trade secret protection for chemical identity which is determinable by reverse engineering. *Id.* This type of information has not traditionally been afforded trade secret protection under state law. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476, 94

S.Ct. 1879, 1883, 40 L.Ed.2d 315 (1974). The Restatement provides that information that may be properly acquired or duplicated without great difficulty should not be considered a trade secret Restatement of Torts, § 757, comment b. The Secretary justified the enlargement of the Restatement definition, reasoning:

> Many products can be reverse engineered if sophisticated analytical techniques are applied, yet cannot be if less advanced technology is used. The determination of what is "practical" in terms of reverse engineering capability rests with this degree of analysis, rather than with a definitive finding of "ability" to be reverse engineered or not. Furthermore, the definition of a trade secret says that the competitor or potential competitor does not know *or* use the information. Thus, even though a competitor could theoretically "reverse engineer" and discover the components of a product, if this information is not in fact used, it remains a *bona fide* trade secret.

48 Fed.Reg. 53314 (emphasis in original). Plainly the Secretary has provided greater protection for chemical manufacturers and importers than that afforded in those states utilizing the Restatement of Torts trade secret definition. Even the Restatement definition, moreover, goes beyond the protection afforded to trade secrets in other regulatory contexts. *See Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1287 (D.C.Cir. 1983) (Food and Drug Administration's adoption of Restatement of Torts trade secret definition inconsistent with Freedom of Information Act).

Section 15 deals only with disclosure by the agency or its employees, and section 6(b)(5) does not permit the Secretary to balance employee safety against competing economic concerns. No other statutory provision has been called to our attention which would justify enlarging

trade secret protection beyond that afforded by state law. Indeed it sems plain that state law cannot prevent the implementation of section 6 safety standards that are otherwise feasible. It appears that the unarticulated premise of the Secretary's concern about protecting trade secrets is that they may be constitutionally protected from the regulatory process. In *Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission*, 555 F.2d 82, 95 (3d Cir. 1977), we rejected a constitutional challenge to rules requiring disclosure of proprietary information as a condition to licensing. The *Westinghouse* holding is supoprted by the Supreme Court's holding in *Ruckelshaus v. Monsanto Co.*, —— U.S. ——, ——, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984), that a trade secret voluntarily disclosed to the E.P.A. in exchange for a registration to sell pesticides is not protected if the owner had notice at the time of disclosure that the E.P.A. was authorized to use all data submitted. These cases suggest that a regulation requiring the disclosure even of formula or process information as a precondition for the sale of hazardous products for use in the workplace would be valid. *See* McGarity and Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 Harv.L.Rev. 837, 864-67 (1980). None of the petitioners urge that the Secretary should have required disclosure to that extent. They do contend, however, that the OSH Act does not authorize the Secretary to promulgate a regulation granting more protection to information claimed to be confidential than is afforded by state law.

We agree that there is no legal justification for affording broader trade secret protection in the Hazard Communication Standard than state law affords. No petitioner urges that the Secretary's original proposal, which would have protected formula and process information but required disclosure of hazardous ingredients, is inadequate. That proposal was consistent with "[t]he general policy

of OSHA . . . that the interests of employee safety and health are best served by full disclosure of chemical identity information." 48 Fed.Reg. 53312 (1983). The petition for review will therefore be granted and the proceedings remanded to the Secretary for reconsideration of the definition of trade secrets, which definition shall not include chemical identity information that is readily discoverable through reverse engineering.

2. The Access Rule

In addition to objections to the definition of trade secrets, several petitioners challenge the provisions of the Hazard Communication Standard relating to access to the allegedly confidential information. The petitioners contend that once a manufacturer raises a claim of trade secret, the Standard places overly stringent procedurel barriers to the discovery of information relevant to the assessment of health hazards. These objections go to: a) the requirement that the request be in writing with a statement of need; b) the limitation of access to "health professionals"; and c) the requirement that a confidentiality agreement with a liquidated damages clause be signed. 29 C.F.R. § 1910.1200(i).

a) The Written Request Requirement

The Secretary justifies the requirement that a request for trade secret information be in writing with supporting documentation as a means of facilitating dispute resolution:

> Then if the matter is to be referred to OSHA to settle any dispute between the requesting party and the employer protecting a trade secret, the Agency will be able to base a decision upon a review of these written materials. Should the matter not be resolved to the satisfaction of all parties, it may result in a citation and referral to the Occupational Safety

and Health Review Commission (OSHRC) for judicial review.

48 Fed.Reg. at 53315. The tendered justification is both reasonable and consistent with the purposes of the Act.

b) The Restriction of Access to Health Professionals

The restriction limiting access to trade secrets to health professionals is more troublesome. Commentators on the proposed standard were generally in agreement that trade secret chemical identity information must be disclosed at least to a treating physician. *Id.* at 53316. The Secretary concluded that other health professionals, particularly those engaged in the prevention of disease or injury, had a legitimate need for chemical identity information. *Id.* at 53318. It declined, however, to authorize direct employee access to specific chemical identities of hazardous substances for which a trade secret is claimed. *Id.* The Secretary advances three rationales to justify restricting employee access to secret chemical identity information.

On reason is that "by and large professional training would be required" for any purpose that would amount to a "need to know" confidential information. *Id.* The United Steelworkers of America, AFL-CIO-CLC, a petitioner, points to a number of instances in the record, however, where non-health-professional workers used chemical identity information to improve workplace safety. They urge that employees and local union safety officers, although not health professionals, have often received training in health and safety, and thus know how to use the basic literature on chemical hazards, and know how to obtain technical assistance. Steelworkers' brief at 40.

A second reason advanced by the Secretary for allowing access only to health professionals, and not directly to employees, is that "providing access to trade secret chemical identities only to health professionals on a confiden-

tial basis will protect these employees adequately." 48 Fed.Reg. at 53318. The Steelworkers point to record evidence, however, that is quite difficult for many workers to obtain the services of a health professional, at least prior to the need for treatment. Steelworkers' brief at 41-42. There is no substantial evidence in the record that significant numbers of unorganized workers will be able to obtain the services of a health professional prior to the time that treatment becomes necessary. Even for organized workers, the record evidence suggests that few local unions retain health professionals.

The Secretary's final justification for limiting access to health professionals involves the risk of disclosure.

> This is not to say thet "downstream" employees are more likely to disclose trade secrets or violate confidentiality agreements than health professionals, but it is an unmistakable fact that the more people who have access to confidential information, the more difficult it is to preserve its secrecy or to locate the source of a leak if one occurs.

48 Fed.Reg. at 53318. The Secretary correctly notes that the chance of a leak increases as the number of people having access to information increases. The issue posed by the petitioners, however, is not the number of persons obtaining access, but the type of persons. There is no record evidence supporting the Secretary's apparent conclusion that employees who are not health professionals will be more likely to breach a confidentiality agreement than would the same number of health professionals. We conclude that the restriction in the Hazard Communication Standard of access to trade secret information to health professionals is not supported by substantial evidence in the record, and is inconsistent with the mandate of section 6(b)(5) that OSHA promulgate the standard that "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee

will suffer material impairment of health. . . ." 29 U.S.C. § 655(b)(5).

c) The Confidentiality Agreement Requirement

The standard requires that, except in a medical emergency, a manufacturer which receives a request for trade secret information may require that the requester sign a confidentiality agreement containing a liquidated damages clause. 29 C.F.R. § 1910.1200(i)(3)(v) (1984). The Standard minimizes the risk that employers will make excessive demands for liquidated damages clauses by providing that the agreement "[m]ay not include requirements for the posting of a penalty bond," but only "a reasonable pre-estimate of likely damages. . . ." 29 C.F.R. § 1910.1200(i)(4)(ii) and (iii) (1984). Some petitioners contend that the requirement of a confidentiality agreement will deter health professionals from lending assistance. In Part IV(D)(2)(b) above we hold that the restriction on access to health professionals is invalid. But in any event, confidentiality agreements are a well-accepted traditional means of allowing access to trade secret information while effectively protecting the owners of that information from irreparable harm. Thus we reject petitioners' challenge to the Standard's requirement that requesters of trade secret information sign a confidentiality agreement.

V.

Conclusion

The petitions for review are properly filed in this court. The Hazard Communication Standard, to the extent that it is valid, preempts state hazard communication rules as they apply to employees in the manufacturing sector. The Standard may operate in that sector, but the Secretary will be directed to reconsider its application to employees in other sectors, and to order its application in those sectors unless he can state reasons why such appli-

cation would not be feasible. The Secretary's ejection of the RTECS list as overinclusive is supported by substantial evidence, consistent with the OSH Act's statutory purpose and is therefore valid. The definition of trade secrets, which is broader than the protection afforded trade secrets by state law, is invalid, and the Secretary will be directed to reconsider a trade secret definition which will not include chemical identity information that is readily discoverable through reverse engineering. The trade secret access rule in the Standard is invalid insofar as it limits access to health professionals, but is otherwise valid, and the Secretary will be directed to adopt a rule permitting access by employees and their collective bargaining representatives.

JAMES McGIRR KELLY, District Judge, concurring and dissenting:

Although I concur with the majority's disposition of most of the issues in this case, I am unable to agree with the majority's position that restricting access to trade secret information to only health care professionals is inconsistent with the requirements of Section 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), and is not supported by substantial evidence in the record.

Section 6(b)(5) states in pertinent part:

> (5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which *most adequately assures, to the extent feasible, on the basis of the best available evidence*, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. . . .

29 U.S.C. § 655(b)(5) (emphasis added).

There is no meaningful reason why every employee or his or her agent should be granted the right to obtain trade secret information. The majority, in overruling the Secretary's restriction which requires that trade secret information only be given to health care professionals, opens the door allowing every person in the work place the right to obtain trade secret information if the person signs a confidentiality statement. The majority holds that restricting trade secret information to the health care profession does not meet the standard that "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health. . . ." 29 U.S.C. § 655 (b)(5). I am not in accord with the majority's position which rejected the Secretary's viewpoint, which is that the health care professions can most adequately and professionally advise workers who may be exposed to hazardous chemicals. I see little, if any, benefit to allow any worker or his agent to obtain such confidential information. Moreover, I find that Section 15 of OSH Act, 29 U.S.C. § 664 is a guidepost to caution the Secretary not only when he or she seeks confidential information for any proceeding under the OSH Act, but also when he or she enacts standards to effectuate the intentions of Congress.

Indeed, Congress has made the Secretary a quasifiduciary for owners of trade secrets in that the Secretary, in exercising his or her powers, must be mindful of the interests the possessors of trade secrets have.

Accordingly, I respectfully dissent on this issue. In all other respects I concur with the majority opinion.

APPENDIX E

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-3554, 83-3561, 83-3565, 84-3066,
84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New York, the State of New Jersey, the State of Connecticut, and National Paint & Coatings Association, *Intervenors.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, American Petroleum Institute & Atlantic Richfield Company, and National Paint & Coatings Association, *Intervenors.*

PUBLIC CITIZEN, INC., *et al.*,
Petitioners,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, National Paint & Coatings Association, American Petroleum Institute & Atlantic Richfield Company,
Intervenors.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Secretary of Labor, United States Department of Labor,
Respondent.

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR and John Donovan, Secretary of the United States Department of Labor,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent.

Argued March 23, 1987

Decided May 29, 1987

Before GIBBONS, Chief Judge, and FISHER, Chief Judge* and KELLY, District Judge**.

OPINION OF THE COURT

GIBBONS, Chief Judge.

United Steelworkers of America and Public Citizen, Inc., *et al.*, petitioners in the petition for review which this court granted in *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir.1985), now move to enforce that judgment. The respondent to the present motion, John A. Pendergrass, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor, has been substituted for Thorne G. Auchter, his predecessor, as a party in this action. Petitioners contend that the Secretary has not complied with our judgment. In *United Steelworkers*, we held that the Hazard Communication Standard, promulgated pursuant to section 6 of the Occupational Safety and Health Act of 1970 (OSH Act), Pub.L.No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982)), is valid and may be applied in the manufacturing sector, but we directed the Secretary "to reconsider its application to employees in other sectors, and to order its application in those sectors unless he can state reasons why such application would not be feasible." 763 F.2d at 743. The Secretary contends that he has fully complied with that judgment, which was formally issued on July 8, 1985. He maintains this contention despite the fact that no final

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* Hon. Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

position with respect to the application of the hazard communication standard outside the manufacturing sector has been taken, and the fact that there is not intention to take such a position until "early 1988". We conclude that the Secretary has not acted in compliance with this court's judgment and has withheld or unreasonably delayed agency action, and that further relief is necessary.

I.

In 1970, Congress enacted the OSH Act and directed the Secretary of Labor to promulgate occupational safety and health standards to further the purpose of the OSH Act—that is, "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. §§ 651(b), 655(b)(1). Section 6(b)(7) of the OSH Act explicitly requires that

> [a]ny standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

29 U.S.C. § 655(b)(7). Section 7(b) of the OSH Act, as amended, provides that "[a]n advisory committee may be appointed by the Secretary to assist him in his standard-setting functions under section 655 of this title." 29 U.S.C. § 656(b). A Standards Advisory Committee on Hazardous Materials Labeling (Advisory Committee) was established in 1974 and was charged with

> develop[ing] guidelines for categorizing and ranking hazards of materials, and guidelines for prescribing the required warnings of such hazards and related information on symptomatology, protective steps and equipment, and safe handling procedures, by such

means as labels, data sheets, and training requirements.

Report of the Standards Advisory Committee on Hazardous Materials Labeling dated June 6, 1975 at iv. The Advisory Committee was directed to submit within 270 days a report to the Secretary in a form from which regulations could be fashioned. *Id.* at iv, 26. The Advisory Committee submitted its report on June 6, 1975, recommending what it described as a "total system" approach to hazard communication, which included the preparation of Material Safety Data Sheets (MSDSs), labeling, and employee training programs. *See id.* at 4-5. The report, like the OSH Act, referred to all workers, making no distinction among employees in different sectors of the economy. Although the Advisory Committee Report was received by the Secretary in June, 1975, no notice of proposed rulemaking on hazard communication was published for some time. On June 28, 1977 the Secretary published an advance notice of proposed rulemaking on hazardous materials labeling. *See* 42 Fed.Reg. 5,372 (1977). In that advance notice, the Secretary requested "public comment as to whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such standard to assure that employees are apprised of the hazards to which they are exposed." *Id.* All "interested persons" were "invited to submit written data, views, and arguments concerning a standard on hazardous materials labeling." *Id.* at 5,373. Among the topics on which comments were requested was "[s]upported cost data of the estimated costs of coming into compliance with the recommendations of the advisory committee." *Id.* At this stage in 1977, the notice, like the Advisory Committee Report's recommendations, was addressed to all employers, not only to employers in the manufacturing sector.

On January 16, 1981, more than ten years after the enactment of section 6(b)(7) of the OSH Act, more than

five years after the Secretary received the Advisory Committee Report, and almost four years after the June 28, 1977 advance notice of proposed rulemaking, the Secretary issued a notice of proposed rulemaking on hazard identification. *See* 46 Fed.Reg. 4,412 (1981). This notice specified that comments had to be received on or before April 18, 1981, and that hearings would be held at five places between May 26, 1981 and September 1, 1981. The proposed hazard communication standard was to be applicable to employers in Division D (manufacturing), major groups 20-39 in the most recent revision of the Standard Industrial Classification Manual published by the Office of Management and Budget (the manufacturing sector). *Id.* at 4,426. The notice further provided:

> Although evidence is presently lacking, the need for the protections of the hazards identification standard may well be as great in some industries excluded from coverage as they are in those covered. Accordingly, OSHA invites comment on the appropriate scope of coverage. Employers currently excluded from the scope of the proposal may be included in the scope of the final standard if evidence in the record ultimately warrants such inclusion. They and others interested in this issue are therefore given notice that they should be prepared to participate in the rulemaking and provide justification, if they so desire, of why particular classes of employers should or should not be excluded.

Id. Thus, the 1981 notice of rulemaking gave notice that employers outside the manufacturing sector should comment and provide information at the scheduled hearings as to why their employees should or should not be excluded.

The 1981 notice of proposed rulemaking was withdrawn, however, on February 12, 1981 for further consideration of regulatory alternatives. *See* 46 Fed.Reg.

12,214 (1981). The notice of withdrawal did not suggest any change in the scope of coverage of any new proposal. Over a year later, a new notice of a proposed hazard communication rule and of public hearing on the proposal was published. *See* 47 Fed.Reg. 12,092 (1982). Like its February 12, 1981 predecessor, the 1982 notice referred to the 1975 Advisory Committee Report. *See id.* Like the 1981 proposed standard, the 1982 proposed standard was also to be applicable to employers in the manufacturing sector. The notice provided, however:

> Although non-manufacturing employers are not covered by the proposal, it is expected that their employees will also benefit from it to a great extent since employees in the manufacturing sectors will be required to send the hazard-related information downstream to their customers. Once finalized and implemented, its effectiveness in triggering downstream transmittal could be assessed, and determinations made as to the type of hazard communication standard that may be effective and beneficial for other industries, such as construction or agriculture. If necessary, the proposal could be extended or modified for these other industries at a later date.
>
> Comment is hereby invited on the appropriateness of the industry scope selected, and whether other industries should be included in the final standard if the record warrants it.

Id. at 12,101-02. Thus, as in the 1981 notice of rulemaking, employers outside the manufacturing sector were given notice that the hazard communication standard might be applied to them, and were invited to comment.

On November 25, 1983, almost thirteen years after section 6(b)(7) was enacted, and over seven years after the Secretary received the Advisory Committee Report, a final hazard communication standard was published. *See* 48 Fed.Reg. 53,280 (1983) (codified at 29 C.F.R. § 1910-

.1200 (1986)). Consistent with the Advisory Committee recommendation, it places primary responsibility for the identification of hazardous substances on their manufacturers and importers, requiring them to prepare MSDSs and to place hazard communication information on labels. *See United Steelworkers v. Auchter*, 763 F.2d at 732-33. It also requires that covered employers make the MSDSs available for employee inspection, 29 C.F.R. § 1910.1200 (g)(8) (1986), and "provide employees with information and training on hazardous chemicals in their work area . . .," 29 C.F.R. § 1910.1200(h) (1986). The final rule protects only employees in the manufacturing sector. Since all chemical manufacturers are in that sector, however, the only significance of limiting the rule to the manufacturing sector is with respect to the employers' obligation to make MSDSs available to their employees and to provide employees with hazard information and training. All employees outside the manufacturing sector are downstream from those upon whom the labeling and identification obligations are imposed. As the standard currently reads, it does not require producers or intermediate suppliers of hazardous substances to provide either MSDSs or properly labeled containers to users in industries outside the manufacturing sector. Both producers and intermediate suppliers must, however, transmit MSDSs and labeled containers to manufacturing sector employers. In addressing the burden of this requirement on intermediate suppliers, OSHA noted that "[t]he additional costs . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed.Reg. at 53,331.

In justifying the narrow scope of the final rule, the Secretary explained:

> Although hazardous chemicals are used in other industries as well, OSHA determined that the employees in the manufacturing sector are at the greatest

> risk of experiencing health effects from exposure to hazardous chemicals. The Agency thus decided to exercise its authority to set priorities for standards for promulgation under Section 6(g) of the Act, and limited the proposed standard's scope of the manufacturing sector.

48 Fed.Reg. 53,284 (1983). The Secretary explained, further:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need.

Id. at 53,286.

II.

In the prior case, the petitioners here, among others, petitioned this court for review of the final standard. They challenged the limited scope of the hazard communication standard, contending that it should not have been limited to the manufacturing sector. Petitioners argued that the exclusion of non-manufacturing industries, many of which have a high incidence of chemical injuries and illnesses, was not supported by the rulemaking record and contravened the purposes of the OSH Act. *See* 763 F.2d at 737.

On the other hand, the Secretary defended the limited scope of the standard solely on the ground that, under 29 U.S.C. § 655(g), he had unreviewable discretion to establish rulemaking practices and chose to address the sector with the most serious problems first. In *United Steelworkers*, we expressly rejected the Secretary's position, holding that he had no discretion to "exclude a particular industry [unless] he informs the reviewing

court, not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards." 763 F.2d at 738. That holding was made with full cognizance of the fact that what was in issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees. Our prior decision is unequivocal:

> We hold, therefore, that the petitions for review of those petitioners who object to the limitation of the Hazard Communication Standard must be granted. . . . Thus the Secretary will be directed to reconsider the application of the standard to employees in other sectors *and to order its application to other sectors unless he can state reasons why such application would not be feasible.* 29 U.S.C. § 655(b)(5).

763 F.2d at 739 (emphasis added). Moreover, our July 8, 1985 judgment is equally unequivocal. The Secretary was directed "to reconsider its application in other sectors *and to order its application in those sectors unless he can state reasons why such application would not be feasible.*" *United Steelworkers v. Auchter*, Nos. 83-3554, 83-3561, 83-3565, 84-3066, 84-3093, 84-3128 (3d Cir. July 8, 1985) (Judgment) (emphasis added). It cannot be seriously contended that that direction permitted the Secretary to do anything other than consider, on the basis of the rulemaking record which we had before us in 1985, the issue of feasibility of communication of hazard information to employees in the non-manufacturing sectors.

III.

Despite the language of our opinion and for our judgment, on November 27, 1985 the Secretary issued an advanced notice of proposed rulemaking, claiming that

the record was insufficient on the issue of the feasibility of expanding the applicability of the standard. The 1985 notice solicited comment on present hazard communication practices in sectors other than manufacturing and on the likely economic impact of extending the hazard communication standard to fifty non-manufacturing industry groups.[1] *See* 50 Fed.Reg. 48,794 (1985). The notice fixed a ninety-day period for comments. It posed nine groups of questions seeking information about the industries not covered by the rule,[2] and three groups of

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[1] In contrast with his position with respect to hazard communication in non-manufacturing sectors, the Secretary apparently had no difficulty in complying with that part of our judgment directing him "to reconsider a trade secret definition which will not include chemical identity information that is readily discoverable through reverse engineering" and "to adopt a rule permitting access [to trade secret information] by employees and their collective bargaining representatives." 763 F.2d at 743. The Secretary, without further rulemaking, promptly issued an interim final rule complying with these directions. *See* 50 Fed. Reg. 48,750 (1985).

[2] The questions asked about uncovered industries are:

1. Please indicate the industry or industries to which the information supplied applies (by SIC Code if possible).

2. What is the current industry practice regarding hazard communications? Do employers generally have written hazard communication programs? Are containers labeled? Are material safety data sheets available for the hazardous chemicals? Are employees trained regarding the hazards and appropriate precautionary measures?

3. What are the costs associated with the aspects of hazard communication that are currently implemented in the industry? Please indicate by specific activity if possible, i.e., costs for training, labels, etc. Based on the present provisions of the Hazard Communication Standard, what additional costs are estimated to be incurred if the standard were extended to your industry?

4. If OSHA extended the provisions of the Hazard Communication Standard to this industry as written, what problems might arise in obtaining or transmitting hazard information? (For example, are there special problems associated with the agricultural industry or small businesses?) What solutions to

questions about possible modifications of the standard as written. We conclude that this further inquiry was unnecessary.

Some of the questions could hardly have been posed with the serious intention of obtaining meaningful information, since the answers are self-evident. For example, the Secretary asked "Are containers labeled? Are material safety data sheets available for the hazardous chemicals?" The standard already in place when these questions were posed required that the chemical manufacturer or importer label containers and prepare ma-

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these problems can you suggest that would still result in employees getting the information they need?

5. Does this industry have fixed work sites? If not, is there some central point where information could be made accessible?

6. Does this industry have transient workers? What current practices are used to ensure such workers are apprised of the hazards they may encounter on the site? Is there training or information specific to the types of jobs performed?

7. To what extent are hazardous chemicals purchased from retail distributors? How is information obtained about these chemicals when purchased from these types of establishments? Do the retail distributors provide hazard information? Are manufacturers contacted directly for the information? If so, has this been a successful approach? Are employees exposed to the chemical involved without receiving information about the specific hazards? How is a determination made regarding the appropriate protective measures to be implemented in this situation?

8. Are "consumer products" used in this industry in a manner that results in different exposure levels than would be encountered in consumer usage? What types of products are these? How is hazard information obtained for these products?

9. Is this industry subject to state-initiated "right-to-know" laws? What has been the industry's experience under such state laws? Are there particular provisions that have been difficult to implement in this industry? If so, what alternative provisions are suggested to ensure employees received the necessary information? To what extent is the industry complying with the state laws?

50 Fed. Reg. at 48,795.

terial safety data sheets. The Secretary also asked, "Does [the] industry have fixed work sites?", knowing full well that the construction industry does not. The Secretary asked "Does [the]industry have transient workers?", knowing full well that the agricultural industry does.

Moreover, most of the remaining detailed questions could have been equally applicable to manufacturing sector employers. Yet the Secretary had not found it necessary to ask them of those employers in the June 28, 1977 advance notice of proposed rulemaking, 42 Fed.Reg. 5,372, in the January 16, 1981 notice of proposed rulemaking, 46 Fed.Reg. 4,412, or in the March 19, 1982 notice of proposed rulemaking, 47 Fed.Reg. 12,092. Nevertheless, the Secretary was able to determine that the hazard communication standard could feasibly be applied in the manufacturing sector. In addition, as noted in Part I above, the 1977 and 1981 notices requested comment from employers in the non-manufacturing sectors and gave notice that the rule might be extended to them. Finally, even today the Secretary, responding to petitioners' motion, does not point to any information received as a result of the November 27, 1975 notice of rulemaking which was not either known or readily ascertainable prior to our last decision. Although the comment period specified in the November 27, 1985 notice expired on February 25, 1986, we have been given no plausible explanation for the delay in formulating a rule between then and now, or for further proposed delay until early 1988.

We hold the Secretary is not in compliance with our previous judgment. As he well understood with respect to the trade secrets issues, that judgment did not contemplate going back to square one. It contemplated action by the Agency on the record which we reviewed. That record was developed after notice to all interested parties that they should furnish "cost data of the estimated costs of coming into compliance with the recom-

mendations of the advisory committee." 42 Fed.Reg. at 5,373. The hazard communication standard adopts essentially the same scheme as the Advisory Committee proposed. The 1977 notice was not limited to the manufacturing sector. Although subsequent notices proposed such limited application, they put interested parties on notice that the application might be broader and invited comment in light of that possibility. The final standard included importers and distributors who had previously been excluded from coverage. *See* 48 Fed.Reg. at 53,331.

An agency may adopt a scope which is "different—even substantially different—from the proposed rule" without engaging in a whole new round of notice and comment. *See American Iron & Steel Institute v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977) (*citing International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n. 51 (D.C.Cir.1973)). *See also United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C.Cir.), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981). Indeed, the Secretary had no difficulty justifying the inclusion of importers and distributors, by noting that "[t]he additional cost . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed.Reg. at 53,331. As petitioners point out, this is equally true of all non-manufacturer user employers. Plainly, the ease with which the same information can be utilized by those employers can be easily determined from the information already in the record. We proceeded in the prior case on that assumption.

The Secretary, relying on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), contends that he should be free to discharge the task of implementing section 6 of the OSH Act at a pace selected in his discretion. *Vermont Yankee* is not relevant, however, for the case is before us at an entirely different stage. Our prior decision con-

sidered rulemaking after full rulemaking procedures had taken place. Moreover, we are not dealing with the modification of a standard based on considerations arising after promulgation of an initial standard. Thus, the Secretary's *Vermont Yankee* argument is no more than an effort to relitigate the contention, explicitly rejected in *United Steelworkers of America v. Auchter*, 763 F.2d at 738, that his priority-setting authority permits him, without explanation, to exclude categories of workers from a duly promulgated standard.

IV.

Sixteen years after Congress directed the Secretary to "prescribe the use of labels or other appropriate forms of warnings as are necessary to insure that employees are apprised of all hazards to which they are exposed", 29 U.S.C. § 655(b)(7), no standard has been promulgated covering approximately two thirds of all workers covered by the OSH Act. This court is empowered by the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (1982). Moreover, we may issue "all writs necessary or appropriate in aid of" our jurisdiction. 28 U.S.C. § 165(a) (1982). Thus, we can issue orders necessary or appropriate to the enforcement of our prior judgment. Exercising the powers conferred by both statutes, we will direct that the Secretary shall, within sixty days of the date of our order,[3] publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible. Such reasons will be supplied separately as to each category of excluded workers. Because our prior judgment did not include a specific time limit we will deny, at this time, the petitioners' motion to hold the respondents in contempt.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

No. 87-1582

ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents

And consolidated cases

[Filed May 20, 1988]

BEFORE: Wald, Chief Judge; Sentelle, Circuit Judge

ORDER

Upon consideration of the union intervenors' motion to transfer proceedings to the Third Circuit, oppositions filed thereto and intervenors' reply, and the Associated Builders and Contractors, Inc. and the construction industry intervenors' motion for emergency stay of OSHA's revised Hazard Communication Standard, oppositions and responses filed thereto and petitioner and intervenors' reply, it is

ORDERED by the court that these consolidated proceedings be transferred to the United States Court of

Appeals for the Third Circuit pursuant to 28 U.S.C. § 2112(a). The revised Hazard Communication Standard was promulgated in response to orders by the Third Circuit in *United Steelworkers v. Auchter*, 763 F.2d 728 (3d Cir. 1985), and *United Steelworkers v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987), and petitioners have raised issues similar to those already considered by that court. *See American Public Gas Ass'n v. FPC*, 555 F.2d 852, 857 (D.C. Cir. 1976) (per curiam). It is

FURTHER ORDERED that an administrative stay of the revised hazard communication standard be granted until the Third Circuit rules on the emergency motion for stay.

Per Curiam

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3345/46/47/48 #D-82

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*

vs.

WILLIAM E. BROCK, ETC., *et al.*

(Complete captions attached)

Present: BECKER, HUTCHINSON, and COWEN, *Circuit Judges.*

Certified copy of District of Columbia Circuit Order filed 5-20-88 transferring cases to Third Circuit and granting stay of revised Hazard Communication Standard until Third Circuit rules on Motion for Stay

Emergency Motion by Petitioner in No. 88-3345, Associated Builders and Contractors, Inc. *and* Construction Industry Intervenors for Stay of Osha's revised Hazard Communication Standard (See 1 of 7)

Motion by Petitioner in No. 88-3348, United Technologies Corporation, for leave to file a Motion for Partial Summary Reversal, (See 1 of 10) *and*

Motion for Summary Reversal of Portions of Respondent's revised Hazard Comm. Standard (See 2 of 10)

Motion by United Technologies Corp. for leave to file reply to Building and Construction Trade Dept. Re-

sponse to Motion for Summary Reversal (See 3 of 10), Reply attached

/s/ Arpi D. Longacre
Deputy Clerk 7-5019

ORDER

The foregoing Motion for stay is granted. The Clerk shall expedite the appeal to the next available list. The motion for leave to file a Motion for Partial Summary Reversal is denied.

By the Court,

/s/ Samuel R. Becker
Circuit Judge

Dated: Jun. 24, 1988

adl/cc: TJW BH SCY DCV
MLF GHC VLB WSR
MWO MB AHF

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345/46/47/48

(See #D-82)

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*

vs.

WILLIAM E. BROCK, ETC., *et al.*

(Complete captions attached)

Present: BECKER, HUTCHINSON, and COWEN, *Circuit Judges.*

Motion by respondent, Secretary of Labor, for clarification of stay order

Copy of Court Order dated 6-24-88 sent for Court's information

/s/ Lauria LoPresti
Deputy Clerk 7-3080

ORDER

The foregoing Motion is granted. The order entered on June 24, 1988 is clarified to make clear that the stay applies only with respect to construction employees in the non-manufacturing sector.

By the Court,

/s/ Samuel R. Becker
Circuit Judge

Dated: July 8, 1988

LLcc: MB AHF DCV
MWO SJM SCY
WSR NIS AER
VLB BHH
EIL TJW
GHC MLF

APPENDIX I

29 C.F.R. Chapter XVII—Occupational Safety and Health Administration, Department of Labor

Part 1926 SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

Subpart C General Safety and Health Provisions

§ 1926.21 Safety training and education.

(b) *Employer responsibility.* (1) The employer should avail himself of the safety and health training programs the Secretary provides.

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the reglations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

(3) Employees required to handle or use poisons, caustics, and other harmful substances shall be instructed regarding the safe handling and use, and be made aware of the potential hazards, personal hygiene, and personal protective measures required.

(4) In job site areas where harmful plants or animals are present, employees who may be exposed shall be instructed regarding the potential hazards, and how to avoid injury, and the first aid procedures to be used in the event of injury.

(5) Employees required to handle or use flammable liquids, gases, or toxic materials shall be instructed in the safe handling and use of these materials and made aware of the specific requirements contained in subparts D, F, and other applicable subparts of this part.

(6) (i) All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be

taken, and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

(ii) For purposes of paragraph (b)(6)(i) of this section, "confined or enclosed space" means any space having a limited means of egress, which is subject to the accumulation of toxic or flammable contaminants or has an oxygen deficient atmosphere. Confined or enclosed spaces include, but are not limited to, storage tanks, process vessels, bins, boilers, ventilation or exhaust ducts, sewers, pipelines, and open top spaces more than 4 feet in depth such as pits, tubs, vaults, and vessels.